OCCUPIERS' LIABILITY: RECREATIONAL USE OF LAND

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ALBERTA LAW REFORM INSTITUTE

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Two other recent initiatives have occurred in this area. There is an inter-departmental committee on recreational corridors. The Environmental Law Centre was funded by Alberta Sport, Recreation, Parks and Wildlife, and Canada Trust, Friends of the Environment, to produce a report on Occupiers' Liability, Trails and Incentives. We look forward to any comments they may have on our advice to the Minister of Justice.

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PART I — EXECUTIVE SUMMARY

Introduction

The Minister of Justice requested a report regarding the liability of occupiers of land to recreational users permitted on their premises without payment of a fee. This report is the response to that request. However, this is not a typical ALRI report. We do not provide a recommendation as to whether this aspect of occupiers' liability law should be reformed. The primary reason for this is that we lack adequate information about the potential problem to be solved, and we lack the resources to compile that information.

While our report does not make a recommendation as to whether the *Occupiers' Liability Act* (*OLA*) should be reformed, it does suggest matters to be taken into account in making this threshold decision. In addition, the report contains an extensive discussion of the issues that should be canvassed if a change is to be made to the existing law of occupiers' liability. Simply put, the purpose of this report is to inform the decision-making process.

Summary of Chapters

Chapter 1

This chapter sets out how ALRI has approached the Minister's request, and the explanation for the approach that has been taken. It provides a brief summary of the current law of occupiers' liability in relation to non-commercial recreational users (NCRUs) who are invited to or permitted on premises. The reform which has already taken place in this area by virtue of the *Agricultural Dispositions Statutes Amendment Act, 1999* (*ADSAA*) is explained. Finally, this chapter introduces the question of what the new legal relationship between occupiers and NCRUs might be, if the existing relationship is to be changed.

Chapter 2

Chapter 2 raises some general matters that should be examined in deciding whether occupiers' liability law should be reformed. We divide these matters into two sections. The first section considers the possible impact that the suggested reform might have on NCRUs and emphasizes the need to assess whether the

potential benefit outweighs any potentially negative impact. The second section examines the policy behind the *OLA* as originally enacted and discusses whether the suggested reform is consistent with that policy.

Chapter 3

The bulk of the report is contained in Chapter 3. This chapter sets out different approaches that could be taken to amending legislation, if a decision to reform is made.

There are six main areas to address in considering amending legislation:

1. The premises to which the amending legislation could apply;
2. The occupiers who could be covered by the amending legislation;
3. The recreational activities that could be encompassed by the amending legislation;
4. The types of recreational entrants who could be subject to the amending legislation;
5. To what extent, if at all, the amending legislation should apply to occupiers who are compensated for the recreational use of their land;
6. The nature of the reduced duty that would be owed under the amending legislation.

We provide three basic choices for each area of discussion, depending on whether the scope of the reform is to be narrow, broad, or intermediate. In combination, these choices illustrate the wide variety of approaches that can be taken to creating recreational use legislation. The basic choices for each matter are summarized in table form at the beginning of the chapter. For ease of reference they are also summarized in written form below.

1. To what premises should the amending legislation apply?

(a) specific kinds of land?

(b) land identified by specified characteristics?

(c) all land or land broadly defined?

2(1). To what occupiers should the amending legislation apply?

(a) only private occupiers?

(b) private occupiers and some public occupiers?

(c) all occupiers, both private and public?

2(2). Should the amending legislation require occupiers to open their land to the public?

(a) generally?

(b) with reasonable limitations?

(c) at all?

3. To what recreational activities should the amending legislation apply?

(a) specific activities?

(b) activities with certain characteristics?

(c) all activities or activities broadly defined?

4(1). To what extent should the amending legislation apply to child NCRUs?

(a) not at all?

(b) to a lesser extent than adult NCRUs?

(c) to the same extent as it applies to adult NCRUs?

4(2). To what extent, if at all, should the amending legislation apply to social guest NCRUs?

(a) not at all?

(b) to a lesser extent than other NCRUs?

(c) to the same extent as it applies to other NCRUs?

5. What types of compensation should preclude application of the amending legislation?

(a) any direct or indirect monetary payment or other benefit in exchange for permitting recreational access?

(b) certain types of direct monetary payment or other consideration in exchange for permitting recreational access?

(c) only direct monetary payments?

6. If the occupier's duty to NCRUs is to be lowered, what should the lower duty be?

(a) a level of liability which is less than the common duty of care, but greater than the liability imposed on an occupier towards a trespasser?

(b) the same liability as that imposed on an occupier towards a trespasser?

CHAPTER 1. INTRODUCTION

A. The Origin of the Project

[1] The Minister of Justice has been approached by a number of groups who have indicated that they are having difficulty obtaining access to land for the purposes of non-commercial recreational use. They think that a change in the *Occupiers' Liability Act*[1] would be one means of addressing this difficulty.

[2] In light of the request, the Minister has asked the Institute for a report and recommendations about the liability of occupiers of land to permitted recreational users of the land when there is no payment of a fee. While a complete review of the OLA might be useful at this stage in the legislation's history, the Institute has deferred such a review and is responding directly to the Minister's request.

B. The Perceived Problem and the Proposed Solution

[3] Our understanding of the basis for the request of the non-commercial recreational users (NCRUs) is as follows:

> (a) they perceive that members of the public are unduly limited in their ability to enter on and use land for non-commercial recreational purposes;
> (b) they perceive that one reason that this access is being limited is that landowners[2] are concerned about their potential legal liability to NCRUs who suffer injury on their land;
> (c) they perceive that if the risk of potential legal liability were reduced, some landowners who previously were not prepared to permit access would do so.

[4] The proposed solution to the perceived problem is a change in the law which would reduce landowners' legal liability to NCRUs who are permitted onto their premises as a means of encouraging landowners to make their land available for

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[1] R.S.A. 1980, c. O-3 (hereinafter the *OLA*).

[2] For the purposes of this report we will use the term "landowner" interchangeably with the term "occupier" even though this is not strictly accurate. The use of the term occupier in the *OLA* is discussed in Appendix B at 91.

recreational purposes. The NCRUs are requesting a reduction in the protection that permitted NCRUs currently have under the *OLA* in exchange for the possibility that they will gain better access to land for recreational use.

C. ALRI's Function

[5] ALRI has limited information as to whether and to what extent landowners deny access to their land to NCRUs because of the fear of legal liability.[3] We do not have reliable information as to whether and to what extent the abolition or reduction of landowners' legal liability to NCRUs would cause landowners to change their minds and cause them to make their land available to NCRUs. Nor do we have the resources to conduct a detailed empirical study which might provide a basis for an informed forecast. Nor do we have sufficient evidence from other jurisdictions on which to base an opinion.[4]

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[3] A report on this subject by the Environmental Law Centre references some evidence to show that the current occupiers' liability regime in fact acts as a disincentive. However, the evidence set out in the report is mostly anecdotal and ALRI does not feel safe in forming a firm conclusion from it. See Arlene J. Kwasniak, *Occupier's Liability, Trails and Incentives*, (Edmonton: Environmental Law Centre, 1999) at 15-20.

[4] The Outdoor Recreation Council of British Columbia (ORC) has suggested that Ontario's 1980 legislative changes to introduce recreational use provisions have increased recreational access in that Province. They refer to communications between ORC and Ontario's Niagara Escarpment Commission and several outdoor recreation groups in Ontario 1983 and 1990. The communications are not reproduced. (Outdoor Recreation Council of B.C., *Recommendations for Law Reform to Enhance Public Access to Outdoor Recreation* (Vancouver: The Council, 1990)). The Ministry of the Attorney General apparently recommended the Ontario recreational use legislation based on a report by the Ontario Trails Council. (Ontario, Ministry of the Attorney General, *Discussion Paper on Occupiers' Liability and Trespass to Property* (Toronto: Communications Office, 1979) at 7.

Although recreational use legislation has existed in the US for many years, the commentators on that legislation rarely deal with whether or not that legislation has actually had the desired effect of increasing recreational access. If they do comment, it is without reference to statistical evidence. See for example: John C. Barrett, "Good Sports and Bad Lands" (1977) 53 Wash. L. Rev. 1 ("It is doubtful whether the Washington recreational use act has had any effect on land occupier behaviour" at 26.); Michael S. Buskus "Tort Liability and Recreational Use of Land" (1979) 28 Buff. L. Rev. 767 ("Although it may not be possible to verify that public access has been advanced by these statutes, the overwhelming majority of state legislatures and courts indicate that it has"); Stuart J. Ford, "Wisconsin's Recreational Use Statute: Towards Sharpening the Picture at the Edges" (1991) Wis. L. Rev. 491 ("The statute is certainly discouraging litigation, but this Comment leaves unresearched the question of whether reduced litigation is actually encouraging landowners to permit recreational use of land." at 534); Jan Lewis, "Recreational Use Statutes: Ambiguous Laws Yield Conflicting Results" (1991) Trial 68 ("Thousands of hikers, hunters, and other outdoor enthusiasts have benefitted from being allowed to gratuitously use the property of others." at 70). A complete list of articles reviewed for the purposes of this report is contained in Appendix C.

[6] The situation is therefore unusual in that we do not feel able to give the Minister any advice as to whether or not there is a need for change in the law as between occupiers of land and NCRUs. That is a question for the Legislature to decide. What we think that we can usefully do to advance the discussion is as follows:

1 We will provide the legal background against which any proposal for the abolition or reduction of landowners' liability to NCRUs should be considered. This will include:
a) an account of the legal rights of access, or the lack of such rights, of NCRUs to recreational land in Alberta. This account appears in Appendix A.
b) an account of the law relating to the legal liability of occupiers of land in Alberta to persons who enter on the land. This account appears in Appendix B.

2 We will outline the tradeoff that is proposed by the NCRUS and the general effect that this would have on the current law of occupiers' liability.

3 Assuming that the Government and the Legislature decide for themselves, that the liability of landowners to NCRUs should be reduced, we will discuss specific issues to be considered in reforming the OLA in the manner requested by the NCRUs. Because the list of issues and available options is long, the discussion is complex. Failure to think the whole subject through in advance, however, is likely to mean that any legislation which is adopted will fail to meet its objectives and will cause undesired side effects.

D. Summary of the Current Law of Occupiers' Liability in Relation to Permitted NCRUs

1. Generally

[7] In Alberta, the responsibilities of occupiers of land to entrants is governed by the *Occupiers' Liability Act*.[5] The Act applies to all occupiers and to virtually all lands in the province.[6] The *OLA* makes a distinction between lawful entrants to premises ("visitors") and other entrants ("trespassers") and the duties that are owed to them. Occupiers are only liable for damages for the death of or injury to trespassers that results from the occupier's wilful or reckless conduct.[7] However, occupiers owe their visitors a duty "to take such care as is reasonable in all of the circumstances of the case to see that a visitor will be reasonably safe in using the premises for the purposes for which he is invited...or permitted to be there".[8] This duty is known as the "common duty of care". The mere fact that a visitor is injured while on the premises does not necessarily make the occupier liable for that injury. Furthermore, an occupier is not under an obligation to discharge the common duty of care to a visitor in respect of risks willingly accepted by the visitor as his.[9]

[8] There is no further elucidation in the *OLA* as to what steps might constitute reasonable care on the part of an occupier, or as to when premises will be considered reasonably safe. If an injury occurs to a visitor on premises and the matter proceeds to adjudication, whether the occupier acted reasonably is a determination that will ultimately be made by the courts. The conduct that is required is that of a reasonably prudent person. The injury-causing event must be reasonably foreseeable for liability to be imposed on the occupier. In addition, in deciding how to act, a prudent occupier is entitled to take into account such factors as the likelihood of the event, the likely magnitude of the resulting injury, whether any steps could be taken to reduce the risk of injury, the effectiveness of those

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[5] *Supra* note 1.

[6] For a more detailed discussion of premises covered by the *OLA* and other aspects of the *OLA* generally, see Appendix B.

[7] *OLA*, *supra* note 1, s. 12.

[8] *Ibid.* s. 5.

[9] *Ibid.* s.7. This section codifies the common law defence of voluntary assumption of risk, which now only applies in limited circumstances. For a further discussion of the voluntary assumption of risk, see Appendix B at 95, below.

steps and the cost of those steps relative to their effectiveness. The flexible nature of the common duty of care allows the courts to adapt that duty to a wide variety of premises and the conditions and activities on those premises.

[9] NCRUs who are invited or permitted onto land are treated the same as any other visitors and have the benefit of the common duty of care.

2. The Agricultural Dispositions Statutes Amendment Act, 1999

[10] The law of occupiers' liability was radically altered in relation to land held under certain types of agricultural dispositions of Crown Land by the *Agricultural Dispositions Statutes Amendment Act, 1999* (*ADSAA*).[10] Among other things, the *ADSAA* amends the *OLA* by adding section 11.1:

> **11.1 The liability of a holder of an agricultural disposition issued under the Public Lands Act in respect of a person who, under section 59.1 of the Public Lands Act and the applicable regulations, enters and uses the land that is subject to the agricultural disposition shall be determined as if the person entering the land were a trespasser.**[11]

The effect of the section is that NCRUs who are permitted onto agricultural dispositions by disposition holders for recreational purposes are not owed the common duty of care that they would otherwise be owed under the *OLA*. Instead they are owed the same "duty" as is owed to a trespasser. Since the liability of an occupier to an adult trespasser is determined under section 12 of the *OLA*, liability would only result from injury or death resulting from the occupier's wilful or reckless conduct.[12]

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[10] Bill 31, 3d Sess., 24th Leg., Alberta, (1999) s. 2. (assented to May 19, 1999; at the time of writing, the Act had not yet been proclaimed). An agricultural disposition is defined under the *ADSAA* as a disposition made under the *Public Lands Act*, R.S.A. 1980, c. P-30, that is made for agricultural purposes, but does not include a conveyance, assurance, sale or agreement for sale, *ibid.*, s. 4(2)(a.1).

[11] *Ibid.* s. 2(3). Section 59.1 of the *Public Lands Act* is set out in section 4(20) of the *ADSAA* and provides that "The holder of an agricultural disposition shall, in accordance with the regulations, allow reasonable access to the land that is the subject of the disposition to persons who wish to use the land for recreational purposes." At the time of writing, the regulations under the *ADSAA* have not been finalized, but a discussion document has been issued in this regard: Alberta, *Agricultural Dispositions Statutes Amendment Act (Bill 31) Discussion Document on Draft Regulations*, (Alberta: Government of Alberta, 1999).

[12] It should be noted that occupiers owe a higher duty to child trespassers under section 13 of the *OLA*. Section 13 is discussed in Appendix B at 103. It is not entirely clear whether child trespassers are still entitled to this higher duty under the *ADSAA*. For a further discussion of this point, see Chapter 3, at 56, below.

E. Some Possible Options

[11] The proposed tradeoff is that occupiers will not be subject to the common duty of care in relation to NCRUs permitted to enter their premises. That leaves open the question of what the new legal relationship would be between the occupier and permitted NCRUs. The law must say something about that. There are two basic choices as to what could be done:[13]

1 *Make occupiers subject to the same liability in relation to permitted NCRUs as they currently are to adult trespassers. Occupiers would only be liable for damages due to the injury or death of the permitted NCRU resulting from the occupier's wilful or reckless conduct.*

[12] As explained above, this is the approach taken under the *ADSAA*. In addition, two Bills have been introduced into the Alberta Legislative Assembly proposing recreational use provisions. Both of the proposed provisions removed the obligation of an occupier to discharge the common duty of care towards NCRUs permitted on premises and retained liability for damages for death or injury resulting from the occupiers' wilful or reckless conduct.[14]

[13] This is also the effect of the recreational use legislation that has been enacted in the other Canadian provinces to address the issue of non-commercial recreational use.[15] However, the majority of these provinces have chosen a different method to achieve the same result. Their legislation deems persons who enter certain premises for the purpose of recreational activities to have willingly assumed all risks. Occupiers owe no duty to persons entering the premises who willingly assume all risks of entering those premises other than a duty not to create a danger with the deliberate intent to do harm to the person or act with reckless

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[13] These two basic choices are discussed in more detail in Chapter 3, at 70, below.

[14] Bill 206, *Occupiers' Liability Amendment Act, 1997*, 1st Sess., 24th Leg., Alberta, 1997 (introduced April 17) and Bill 220, *Occupiers' Liability Amendment Act, 1998*, 2d Sess., 24th Leg., Alberta, 1998 (introduced March 23).

[15] The other provinces with recreational use provisions in their *OLAs* are British Columbia, (R.S.B.C. 1996, c. 337, s. 3 as amended in 1998, c. 12 s. 1, 2), Ontario, (R.S.O. 1990, C. 0.2, s. 4), Manitoba, (R.S.M. 1987, c. 08, as amended S.M. 1988-1989, c. 13, s. 32). Nova Scotia (S.N.S. 1996, c. 27, s. 6) and P.E.I. (R.S.P.E.I. 1988, c. 0-2, s. 4). In Manitoba, the recreational use provision applies only in relation to off-road vehicle use (s. 3(4)). In Saskatchewan there is separate legislation governing the liability of occupiers to hunters and snowmobilers (*The Snowmobile Act*, R.S.S. 1978, c. S-52, s. 34 and *The Wildlife Act, 1997*, S.S. 1997, c. W-13.11, s. 43).

disregard to the safety of the person.[16] The result of these provisions is to create an obligation to an NCRU in certain circumstances which is the same as the liability to trespassers created under s. 12 of the *OLA*. It is not clear why the other provinces chose this particular mechanism to achieve this result. We note that those provinces, unlike Alberta, do not draw a distinction between visitors and trespassers in their legislation; occupiers owe trespassers the same common duty of care as is owed to visitors. Therefore simply providing that NCRUs are to be treated as if they were trespassers is not a viable option in the other provinces.

[14] Applying the duty that was traditionally owed to trespassers at common law to NCRUs is also the approach that has been taken in the US jurisdictions that have recreational use legislation. This is in accordance with the suggested Model Act that was produced in 1965 by the Council of State Governments.[17] Although the suggested legislation has been modified to some extent in many states, in general the US legislation centres around three provisions. The first provision eliminates the application to NCRUs of the duty owed to invitees and licensees at common law.[18] The second provision confirms that invitation or permission does not in any way alter the duty that is owed to NCRUs, and eliminates potential liability on the part of the occupier to NCRUs who are injured by other NCRUs permitted onto the premises.[19] The third provision retains liability for certain

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[16] These provinces are British Columbia (*ibid.* s. 3(3)), Ontario (*ibid.* s. 4(1)), Nova Scotia (*ibid.* s. 5(1) (word "deliberate" omitted) and P.E.I. (*ibid.* s. 4(1)). The relevant provisions in the Manitoba *OLA ibid.* and the Saskatchewan *Wildlife Act*, *ibid.* indicate that occupiers do not owe a duty of care to the entrants covered by those Acts, except the duty not to create a danger with the deliberate intent of doing harm or damage and the duty not to act with reckless disregard. *The Snowmobile Act* creates the same duty, except where there is a common material or business interest between the snowmobiler and the occupier (*ibid.* s. 34(2)).

[17] Council of State Governments, "Public Recreation on Private Lands: Limitations on Liability" (1965) 24 Suggested State Legislation 150.

[18] *Ibid.*, s. 3:

> Except as specifically recognized by or provided in section 6 of this act, an owner of land owes no duty of care to keep the premises safe for entry or use by others for recreational purposes, or to give any warning of a dangerous condition, use, structure or activity on such premises to persons entering for such purposes.

[19] *Ibid.*, s. 4:

> Except as specifically recognized by or provided in section 6 of this act, an owner of land who either directly or indirectly invites or permits without charge any person to use such property for recreational use does not thereby:
>
> (a) Extend any assurance that the premises are safe for any purpose.

(continued...)

actions that would create liability to a trespasser at common law.[20] The structure of the legislation reflects the fact that in the US, unlike in Canada, recreational use legislation was introduced to carve out an exception to the common law of occupiers' liability, rather than as part of a statutory regime.

2 *Create a new duty of care owed by occupiers to NCRUs. This duty would fall somewhere between the traditional duty owed to trespassers and the common duty of care.*

[15] The first choice that we outlined is to make occupiers liable to NCRUs in the same circumstances that they would have been liable to trespassers at common law. However, the traditional common law approach to trespassers has been rejected by the Supreme Court of Canada in favour of a duty of "ordinary humanity".[21] So it is arguable that a new duty should now apply to trespassers and therefore to NCRUs. Unfortunately it is far from clear what the duty of common or ordinary humanity entails except that it is higher than the traditional trespasser duty and lower than the common duty of care. In the United Kingdom, where the concept of the duty of ordinary humanity originated, legislation has been passed in an effort to clarify this duty, or something akin to it, in relation to trespassers.[22] A similar approach could be taken in formulating the appropriate duty to be applied to NCRUs in this jurisdiction.

[16] The result of either of these approaches is that permitted NCRUs subject to the legislation who are injured on premises may be deprived of remedies that the current law gives them. Whether the possibility of increased access is more

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[19] (...continued)
(b) Confer upon such person the legal status of an invitee or licensee to whom a duty of care is owed.
(c) Assume responsibility for or incur liability for any injury to person or property caused by an act o[r] omission of such persons.

[20] *Ibid.*, s. 6(a):
Nothing in this act limits in any way any liability which otherwise exists:
a) For willful or malicious failure to guard or warn against a dangerous condition, use structure, or activity...

[21] *Veinot* v. *Kerr- Addison Mines Ltd.* (1974), 51 D.L.R. (3d) 533. A more detailed discussion of the common law relating to trespassers and of the development of the duty of ordinary humanity is contained in Appendix B at 98, below.

[22] *Occupiers Liability Act 1984* (U.K.), 1974, c. 3.

desirable than this increased assumption of risk is the fundamental issue that the Government and the Legislature must decide. In the next chapter we discuss some matters that we think should be taken into consideration in making that decision.

CHAPTER 2. MATTERS TO BE CONSIDERED IN DECIDING WHETHER THE LAW SHOULD BE CHANGED

A. The Possible Impact on NCRUs

[17] There has been little analysis of whether recreational use legislation is actually in the best interests of NCRUs. As one commentator put it " The underlying premise of this legislation is that the public benefit of encouraging free use of the land outweighs the increased cost of injuries to hapless sportsmen."[23] In considering whether or not to reform the law, the possible impact on NCRUs in terms of access to land, safety and compensation should be taken into account.

1. Access

[18] Occupiers in Alberta owe a higher duty to NCRUs who are invited or permitted onto premises than to NCRUs who are trespassing. Regardless of the nature of that higher duty, it seems reasonable to conclude that occupiers would tend to refuse access as a result.

[19] In theory, attempting to alleviate the liability concerns of occupiers by lowering the duty that is owed by them to NCRUs should result in some occupiers being prepared to make land available for recreational use who would not otherwise be prepared to do so. But there is no guarantee that lowering the duty will actually result in increased access. There are many other reasons why an occupier might be reluctant to grant access to their lands including the risk of vandalism, interference with crops and livestock, the invasion of privacy and difficulty removing individuals from premises who are engaged in undesirable activities.

[20] In summary, there is some reason to expect that lowering occupiers' duties to NCRUs might make some additional land available for recreational use. The question for the Legislature is whether this potential benefit to NCRUs outweighs the potential costs to them.

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[23] Barrett, *supra* note 4 at 1.

2. The Safety of NCRUs

[21] One of the possible effects of occupiers' liability law is a reduction in the number of personal injury accidents caused by unsafe premises.[24] Under the *OLA*, occupiers who invite or permit entrants to their premises are liable to those entrants for injuries if they fail to take reasonable steps to make the premises reasonably safe. In theory this will encourage occupiers who are concerned about their potential liability to injured visitors to take steps to reduce the likelihood of accidents on the premises. In the result, it is hoped that lands will be safer and there will be fewer and less severe injuries arising from its use.

[22] If the common duty of care is removed in relation to NCRUs, so is the incentive for occupiers to make efforts to render their premises reasonably safe. Areas that might have been made safer may not be, and areas that were previously safe for recreational purposes may be left to deteriorate. There is a risk that the number and severity of injuries to NCRUs will increase as a result.

[23] An occupier concerned about their potential liability to entrants if they fail to satisfy the common duty of care has the option of refusing access altogether. This is the option that NCRUs may wish to discourage. But while this may seem an undesirable option from the perspective of an NCRU, it is not necessarily a bad thing. It is certainly arguable that NCRUs and society as a whole are better served where occupiers refuse access to premises altogether when those premises cannot be made reasonably safe.

3. Compensation

[24] Visitors who are injured as a result of the condition of or activities on an occupiers' premises may be entitled to compensation for their injuries. The right of the injured visitor to compensation is not absolute. Occupiers' liability law requires that the defendant be at fault for the injury. Under the *OLA*, an occupier is at fault for injuries to visitors caused by the condition of premises or activities on

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[24] Whether the *OLA* actually serves the purpose of reducing the incidence of personal injuries is an interesting question, but one that is beyond the scope of this report. There is a vast literature that considers whether negligence law serves this purpose, or is intended to serve this purpose in the modern context. One consideration is the availability of liability insurance, which may effectively remove the threat of liability insofar as an occupier is concerned. If an occupier has purchased sufficient liability insurance to cover the amount of any possible liability, they may not be inclined to make further risk-reduction efforts to avoid liability.

those premises where they have failed to take such care as is reasonable to see that the visitor will be reasonably safe in using the premises. Where a visitor is injured through no fault of the occupier, there is no liability and no resulting obligation on the occupier to provide compensation.[25]

[25] Under the current *OLA*, NCRUs lawfully on premises who are injured because the occupier failed to take reasonable steps to make the premises reasonably safe, have the right to seek compensation from that occupier. If the duty is relaxed, then the potential exists for injured NCRUs to go without compensation notwithstanding that the injury was the fault of the occupier and the NCRU was an innocent party. This result runs counter to modern tort law trends imposing liability for harm caused by unreasonable behaviour.[26] Shifting the risk of the unreasonable behaviour from the occupier to the NCRU imposes the cost of injury onto a group of individuals who may be less able to bear that burden through insurance or otherwise.

B. Consistency with the Policy Behind the OLA

[26] We have some concerns about implementing changes to the current occupiers' liability regime on a piecemeal basis without considering the logic of the legislation as originally designed. The purpose of enacting the *OLA* was essentially twofold: to simplify a regime that had become focussed on technical considerations rather than on legal principles, and to bring occupiers' liability law into step with modern negligence law.

[27] To achieve the first purpose the *OLA* creates a single duty of care in relation to all lawful entrants. The responsibility of a landowner to visitors to the premises no longer depends on complex considerations involving the purpose of the visit or whether an unusual danger existed and whether that danger was concealed or readily apparent to an entrant.[27] Making NCRUs a distinct category of entrant, and

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[25] Although negligence law is fault-based in theory, it is difficult to resist the conclusion that in some cases a court's finding of fault on the part of the defendant occupier may have been influenced by the court's sympathy for the plight of a badly injured plaintiff, and the apparent depth of the defendant's (or the defendant's insurer's) pockets.

[26] Some might even suggest that the trend is towards the imposition of strict liability.

[27] For a detailed discussion of the law of occupiers' liability prior to the *OLA*, see Institute of Law

(continued...)

thus an exception to the general duty owed to lawful visitors represents a move back towards the type of complex, stratified system that existed at common law.

[28] Secondly, in formulating the *OLA*, consideration was given to the appropriate balance between the rights of occupiers and the rights of visitors to their premises. The appropriate balance chosen was the common duty of care. This balance is consistent with the standard of reasonableness which is now firmly entrenched in the law of negligence. A decision to relax the duty owed by occupiers to NCRUs who are invited or permitted on premises represents a departure from that standard and should be clearly justified.

[29] While the current regime may act as a disincentive to occupiers opening their land to public use, that does not necessarily mean that it strikes an unfair balance as between occupiers and NCRUs. There may be a perception that the *OLA* places an unfair burden on occupiers in relation to NCRUs. However, a review of Alberta cases dealing with recreational use injuries does not suggest that occupiers are invariably found liable for those injuries.[28]

[30] We recognize that the reported cases do not represent all of the instances in which occupiers have been sued for recreational use injuries, and that there may be

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[27] (...continued)
Research and Reform, Report 3: *Occupiers' Liability* (Edmonton: ILRR, December 1969) [hereinafter Report 3].

[28] See for example: *Slaferek v. TCG International Inc. et al* (1997), 297 A.R. 113 (Q.B.) where the plaintiff was injured in a tubing accident which was found not to be reasonably foreseeable by the occupier; *Gibson v. Haggith*, (1994), 156 A.R. 229 (Q.B.) where the plaintiff was injured while riding an ATV and the occupier was found to have satisfied the duty owed under the *OLA*; *Worobetz v. Panorama Resort (Title Holding) Corp.* (1993), 9 Alta. L.R. (3d) 38 (Q.B.) where the plaintiff was struck by a sliding sign which had been dislodged and the accident was not considered reasonably foreseeable by the occupier; *Smith v. Allen et al.* (1990), 108 A.R. 344 (Q.B.) where the plaintiff was injured in a go-cart accident and the occupier took reasonable care to see his patrons were safe; *Diodoro v The City of Calgary* (1990), 108 A.R. 139 (Q.B.) where a plaintiff who could not swim almost drowned and was found to be the author of his own misfortune; *Novak v. TIW Industries Ltd.* (1986), 67 A.R. 374 (Q.B.) where the plaintiff was injured by a chair lift, but the occupier took reasonable care to ensure that the premises were reasonably safe for the purposes for which they were intended to be used; *Schwab v. Alberta* (1986), 75 A.R. 1 (C.A.) where a swimmer who was injured by a submerged pipe failed to recover in the absence of any evidence that the occupier knew or ought to have known of the existence of the object which caused the injury; *Meier v. Qualico* (1985), 56 A.R. 48 (C.A.) where the plaintiff sustained an injury riding a motorcycle over an embankment and was found to be the author of his own misfortune; *Flint v. Edmonton Country Club Ltd.* (1980), 26 A.R. 391 (Q.B.) where the plaintiff's injury from tripping over a fence on a golf course was not reasonably foreseeable.

many other cases where occupiers have been sued and have paid money to settle these types of cases short of trial. We also have some sympathy for the suggestion that the law fails to give practical guidance to occupiers in how to minimize their potential liability to recreational users. But the duty owed by occupiers to NCRUs lawfully on their premises is the same as the duty owed by occupiers to any other visitors to the premises. Either the criticisms of the duty apply in all circumstances, or there is something particular to the application of the duty between occupiers and NCRUs that makes the duty inappropriate to that use. In the former case, it would be preferable to review the application of the *OLA* as a whole than to deal with it on a piecemeal basis. If the latter is true, then the elements that make the duty inappropriate to the recreational use context should also limit the extent of any reform.

C. Summary

[31] In summary, a decision as to whether or not the law should lower the liability of occupiers to NCRUs should be based on a consideration of the following factors:

(1) The advantages which NCRUs may be expected to obtain through greater access to land for recreational purposes;

(2) The disadvantages which NCRUs may be expected to suffer through the lessening of incentives to landowners to take reasonable care to make land safe for visitors and through reduced ability to claim compensation if the common duty of care is not performed;

(3) The additional complexity in the law of occupiers' liability which will be created by a special exception to the general rules.

CHAPTER 3. LAW REFORM OPTIONS

A. Introduction

[32] Assuming that the Government and the Legislature decide that the liability of landowners to NCRUs should be changed, there are a number of different approaches that could be taken in implementing this decision. We have already said that we do not feel that we have reliable information in relation to access issues. This makes it difficult to formulate specific recommendations for implementation. Accordingly, this chapter simply raises some of the issues that should be considered if it is decided to reform the law and sets out some basic options for dealing with those issues.

[33] It is artificial to separate the various issues that arise in the consideration of recreational use legislation. Ultimately, decisions made in relation to one issue will have some bearing on decisions made in relation to the others. However, it is useful to highlight potential problem areas and how these have been dealt with in other jurisdictions and this is easiest to digest when divided into discrete categories.

[34] Whatever options are chosen, the choices should be made on the basis of reliable factual information about access problems, bearing in mind the narrow objective of recreational use legislation, the objectives of occupiers' liability law in general and the logic behind the current statutory regime.

[35] In addition, if the intent of the proposed legislation is to alleviate occupiers' concerns in relation to liability, it is critical that the application of the proposed legislation and its effect are clear. If an occupier is uncertain as to what their responsibilities are or whether or not they will receive the benefit of the legislation, then they are less likely to allow NCRUs onto their land.

[36] As mentioned in chapter 1, limited reform has already taken place in this area of the law through the *ADSAA*.[29] We have included reference to this Act and draft

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[29] *Supra* note 10. For a more detailed discussion of the changes to the law of occupiers' liability made (continued...)

regulations in our discussion of each issue mainly for information purposes. Some of the issues which are raised in this chapter have been addressed in the *ADSAA*. Other issues are not dealt with specifically, if at all. On this basis, and since the limited amendment to the *OLA* was made in the context of a much broader reform relating to agricultural dispositions we do not think that the enactment of the *ADSAA* precludes the need for further policy analysis.

B. Questions to be Addressed

[37] The basic question–should the *OLA* be amended so that occupiers will owe something less than the general duty of care to NCRUs, and, if so, how–is simple to state. However, in order to come to a satisfactory conclusion, a number of subsidiary questions must be answered.

[38] We will first outline the questions that should be addressed and will set out optional answers in respect of each question in tabular form. The tables are organized to identify choices which will minimize the scope of the legislation, choices which will maximize the scope of the legislation, and some choices that will fall between the two extremes. We think that this will assist the reader in following the detailed discussion of the questions which follows the initial outline.

[39] The basic questions are as follows:

1. To what premises should the amending legislation apply?
(a) specific kinds of lands?
(b) land identified by specified characteristics?
(c) all land or land broadly defined?

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[29] (...continued)
by this Act see the text accompanying that note and the comments under the headings "*Reform Under the ADSAA*" throughout this chapter.

(a) Narrow Scope	(b) Intermediate Scope	(c) Broad Scope
Specific lands such as: •recreational trails •utility rights of way •recreation facilities closed for the season •highway reservations •golf courses when not open for playing •unopened road allowances •orchards, pastures, woodlots •agricultural dispositions •irrigation districts •parks	**Land identified by characteristics such as:** •primary land use (agriculture, forestry) •location (rural, urban) •size •state of development •land under cultivation •accessibility	**Broad definition such as:** • "premises" as per *OLA* • " land suitable for recreational use"

2(1). To what occupiers should the amending legislation apply?

(a) only private occupiers?

(b) private occupiers and some public occupiers?

(c) all occupiers, both private and public?

2(2). Should the amending legislation require occupiers to open their land to the public?

(a) generally?

(b) with reasonable limitations?

(c) not at all?

	(a) Narrow Scope	(b) Intermediate Scope	(c) Broad Scope
(1) Public v Private	•private occupiers only	•private occupiers •some public occupiers (such as municipalities, school districts, irrigation districts etc.)	•all occupiers, including the Crown
(2) Access to Public	•only occupiers who make the land available to the general public at all times	•occupiers who make their land available to some of the public, some of the time	•all occupiers, regardless of the availability of the land to the public

3. To what recreational activities should the amending legislation apply?

(a) specific activities?

(b) activities with certain characteristics?

(c) all activities or activities broadly defined?

TABLE 3: ACTIVITIES TO WHICH THE AMENDING LEGISLATION SHOULD APPLY

(a) Narrow Scope	(b) Intermediate Scope	(c) Broad Scope
Specific activities such as:	**Activities with certain characteristics such as:**	**Broad definition of recreational activities such as:**
•animal training •ballooning •berry picking/ fruit picking/ •biking •birdwatching •boating •camping •canoeing •cross-country running •cross-country skiing •enjoying historical, archaeological or scientific sites •fishing •four-wheeling •gold panning •hangliding •hiking •horseback riding •hunting •ice-fishing •jogging •kayaking •kite-flying •orienteering •photography •picnicking •rock climbing •running •sightseeing •skating •sleigh-riding •snowmobiling •snow shoeing •spelunking •swimming •tobogganing •use of all terrain vehicles •use of animals for transportation •walking •water sports •white water rafting	•some degree of physical exertion •usually done outdoors •requires large, undeveloped areas •limited to moderate risk (????)	• "all recreational activities" • "an activity on another's property, the purpose of which is relaxation, pleasure or education"

4(1). To what extent, if at all, should the amending legislation apply to child NCRUs?

(a) not at all?
(b) to a lesser extent than adult NCRUs?
(c) to the same extent as it applies to adult NCRUs?

4(2). To what extent, if at all, should the amending legislation apply to social guest NCRUs?

(a) not at all?

(b) to a lesser extent than other NCRUs?

(c) to the same extent as it applies to other NCRUs?

	TABLE 4: NCRUS TO WHICH THE AMENDING LEGISLATION SHOULD APPLY		
	Narrow	Intermediate	Broad
Child NCRUs	•amendment does not apply to child NCRUs (common duty of care applies)	•occupiers' duty to child NCRUs the same as occupiers' duty to child trespassers	•amendment applies to child NCRUs
Social Guests	•amendment does not apply to social guest NCRUs (common duty of care applies)	•occupiers' duty to social guest NCRUs is modified	•amendment applies to social guest NCRUs

5. What types of compensation should preclude application of the amending legislation?

(a) any direct or indirect monetary payment or other benefit in exchange for permitting recreational access?

(b) certain types of direct monetary payment or other consideration in exchange for permitting recreational access?

(c) only direct monetary payments?

TABLE 5: TYPES OF COMPENSATION WHICH PRECLUDE THE APPLICATION OF THE AMENDING LEGISLATION		
(a) Narrow	(b) Intermediate	(c) Broad
•amendment does not apply if the occupier receives any direct or indirect monetary payment or other benefit in exchange for access	•amendment applies even though the occupier has received some type of indirect payment or benefit	•amendment applies unless the occupier receives a direct monetary payment in exchange for access

6. If the occupier's duty to NCRUs is to be lowered, what should the lower duty be?

(a) a level of liability which is less than the common duty of care, but greater than the liability imposed on an occupier towards a trespasser?

(b) the same liability as that imposed on an occupier towards a trespasser?

(a) Narrow	(b) Intermediate	(c) Broad
• level of duty or liability which is less than the common duty of care but greater than the liability imposed towards a trespasser [common duty of care ⇐ ⇒ wilful or reckless conduct]		•same level of liability as imposed towards trespassers

C. Discussion of Issues

1. Types of Premises

[40] The *OLA* has application to every conceivable type of premises in Alberta from wilderness areas to private residences. If the *OLA* is to be amended to lower the liability owed by occupiers to NCRUs, a decision must be made as to whether that reduction of duty should also apply in relation to all premises or whether its application should be limited to certain types of premises.

[41] Recreational use legislation in other jurisdictions takes two basic approaches to the land that is included in the ambit of that legislation. Either the types of land are defined broadly and other methods are used to restrict the application of the legislation, or the recreational use provisions only apply to certain kinds of land. Where the recreational use provisions only apply to certain kinds of land, the land is either identified as a specific type (eg. utility rights of way, private roads) or is described in more general terms by reference to factors such as its location, characteristics or primary use.

a. Reform Under the ADSAA

[42] The change in the duty owed by occupiers to recreational users introduced by the *ADSAA* applies only in relation to land held under Crown agricultural dispositions.

b. Applying the Legislation to All Premises

[43] In theory the types of premises which could be used for non-commercial recreational use and therefore the types of premises to which access might be sought for this purpose are virtually unlimited. Skateboarders and rollerbladers might consider access to any paved area desirable, while snowmobilers and ATV users are seeking large, undeveloped areas to explore. Hikers might use paved or

unpaved trails, and some walkers consider shopping malls ideal for exercise. Backyard swimming pools could provide opportunities for recreational use to individuals who otherwise might not be able to go swimming. Even premises developed specifically for commercial recreational use could be included in the application of a recreational use provision on the basis that occupiers would thereby be encouraged to give free access to charitable groups or other users who would not normally have access to those facilities.

[44] Therefore, if the sole objective of reforming the *OLA* by relaxing the liability of occupiers to NCRUs is to encourage increased access to premises for recreational use, it is difficult to justify many limitations upon the premises to which the provision might apply. The only logical requirement might be that the land involved be the type of land suited for and desired for non-commercial recreational use.[30] Given the large number of activities that could be considered recreational, it is doubtful that this type of requirement would be a meaningful limitation.[31]

[45] In the majority of the states with recreational use statutes, the types of premises to which the statutes apply are extremely broad. The land to which the legislation applies is most frequently defined to include "lands, roads, water, watercourses and private ways" as well as "buildings, structures, and machinery or equipment when attached to the realty".[32]

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[30] For example in Alabama the recreational use legislation applies to outdoor recreational land which is defined as "(l)and and water, as well as buildings, structures, machinery and other such appurtenances used for or susceptible of recreational use". ALA. CODE § 35-15-21(2) (1991)

[31] Some of the difficulties that arise in trying to define "recreation" are discussed in more detail in section 3 at 51-53, below.

[32] See ARK. CODE ANN. § 18-11-302(1) (Michie 1997 & Supp. 1999); CONN. GEN. STAT. ANN. § 52-557f (2) (West 1991); DEL. CODE ANN. tit.7, § 5902(1) (1991); GA. CODE ANN. § 51-3-21(2) (1982); IDAHO CODE § 36-1604(b)(1) (1994 & Supp. 1999); ILL. ANN. STAT. ch. 745, para. 65/2 (Smith-Hurd 1993); KAN. STAT. ANN. § 58-3202(a) (1994); KY. REV. STAT. ANN. § 411.190(1)(a) (Michie 1992 & Supp. 1998); LA. REV. STAT. ANN. § 9:2791C (West 1997); MD. CODE ANN., [NAT. RES. I] § 5-1101(d) (1998); MO. ANN. STAT. § 537.345(2) (Vernon 1988); N.D. CENT. CODE § 53-08-01(2) (Supp. 1999); NEB. REV. STAT. § 37-729 (1998); PA. CONS. STAT. ANN. tit. 68, § 477-2(1) (1993); R.I. GEN. LAWS § 32-6-2(2) (1994 & Supp. 1998); S.C. CODE ANN. § 27-3-20(a) (Law. Co-op. 1991); S.D. CODIFIED LAWS ANN. § 20-9-12(2) (1995); UTAH CODE ANN. § 57-14-2(1) (Supp. 1999); WYO. STAT. § 34-19-101(a)(i) (1999).

[46] Notwithstanding the broad wording of the legislation, some US courts have limited the application of recreational use legislation to certain types of land. These courts have used a variety of different criteria to identify the types of land to which recreational use provisions should be applied. The criteria include whether the land is susceptible to use for the recreational activities enumerated in the legislation, the use for which the land is zoned, the nature of the community in which it is located, its relative isolation from densely populated neighbourhoods, its general accessibility to the public at large, whether the land is rural or urban, the size of the land, whether the land is developed, occupied or improved, and whether the injury-causing conditions on the land are natural or artificial.[33] It should be noted that in arriving at these factors, some courts not only took into account whether the land in question was the type of land to which access might be sought for recreational use, but also whether the land was the type of land that was susceptible to adequate policing or correction of dangerous conditions.[34]

c. *Applying the Legislation to Lands with Certain Characteristics*

[47] There are four Canadian provinces with general recreational use provisions in their occupiers' liability legislation. British Columbia, Ontario, Nova Scotia and

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[33] See generally *Yanno* v. *Consolidated Rail Corp.*, [1999] WL 1260845 (Pa. Super.): appropriate to consider use of the property, its size, location, openness and state of improvement; *Sulzen* v. *United States*, 54 F. Supp.2d 1212 (C.D. Utah 1999): land must have some combination of the following: rural, undeveloped, appropriate for the types of activities listed in the statute, open to the general public without charge and a type of land that would have been opened in response to the statute; *Keelen* v. *State Dept. of Culture, Recreation & Tourism*, 463 So.2d 1287 (La. 1985): legislature intended to confer immunity on owners of undeveloped, nonresidential rural or semi-rural land areas; *Wymer v. Holmes*, 412 N.W.2d 213 (Mich. 1987): legislation did not apply to urban, suburban and subdivided lands.

In New Jersey, a series of cases limited the types of premises to which the recreational use legislation applied. This led to amendments to the legislation in 1991 which explicitly extended the scope of the immunity to premises whether or not improved or maintained in a natural condition or part of a commercial enterprise. The amendments also provided that the provisions of the act were to be liberally construed in favor of occupiers (L. 1991, c. 496 § 2). Notwithstanding this amendment, a recent decision upheld the previous case law to the extent that it differentiated between rural and urban premises: *Mancuso* v. *Klose* 730 A.2d 911 (Sup. Ct. N.J.A.D. 1999).

In California, a series of cases which deprived landowners of the benefits of the recreational use provision if their land was not suitable for recreational use, was "assigned to the dustbin of California legal history" by a subsequent decision of the Supreme Court (see *Ravell* v. *United States* 22 F.3d. 960 (9th Cir. 1994) and *Ornelas* v. *Randolph* 847 P.2d 560 (Cal. 1993)).

[34] *Tijerina v. Cornelius Community Christian Church* 539 P.2d 634 (Ore. 1975). However, in 1996, these comments were held to be *dicta* and contrary to the plain words of the statute: *Wilson* v. *United States* 940 F. Supp. 286 (Ore. 1996).

Prince Edward Island all restrict the application of these provisions to certain types of premises.[35] The relaxed duty applies only to occupiers of:

a) premises used primarily for agricultural purposes (BC, NS)
b) premises used primarily for forestry purposes (NS)
c) rural premises that are
    i) used for forestry or range purposes (BC)
    ii) vacant or undeveloped (BC, NS, ON, PEI)
    iii) forested or wilderness premises (BC, ON, PEI)
    iv) used for agricultural purposes including land under cultivation, orchards, pastures, woodlots and farm ponds (ON, PEI)
d) forested or wilderness land (NS)
e) recreational trails marked as such (BC, NS, ON, PEI)
f) utility rights of way and corridors excluding structures thereon (BC, NS, ON)
g) recreation facilities when closed for the season (NS)
h) highway reservations (NS)
i) mines, where the harm is not the result of non-compliance with a law relating to the security of such mine and the safety of persons and property (NS)
j) golf courses when not open for playing (ON, PEI)
k) unopened road allowances (ON, PEI)
l) private roads reasonably marked as such (BC (rural only), NS, ON, PEI)

[48] Both of the Bills introduced into the Alberta Legislative Assembly proposing recreational use provisions took a similar approach to the application of the legislation.[36] Both Bills provided that the legislation would apply to golf courses when not open for playing, and recreational trails reasonably marked as such. Bill 206 also applied to premises used for agricultural purposes (including land under cultivation, vacant or undeveloped premises, and forested or wilderness premises) and utility rights of way excluding structures located thereon.[37] Bill 220 applied to

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[35] B.C. *OLA*, *supra* note 15 s. 3(3.3), Ont. *OLA*, *supra* note 15 s. 4(4), N.S. *OLA*, *supra* note 15 s. 6(1), P.E.I. *OLA*, *supra* note 15 s. 4(4).

[36] *Supra* note 14.

[37] *Ibid.* s. 2(a)(c).

agricultural land[38] including utility rights of way granted pursuant to section 72 of the *Land Titles Act*.[39]

[49] For the most part the types of land which are included in the Canadian recreational use provisions, even where they are specifically categorized, are rural lands which are undeveloped, unoccupied, in a natural or close to natural state and suitable for recreational use. Their primary use is generally not recreation.[40]

[50] Some U.S. jurisdictions expressly limit the application of their recreational use legislation to specific types of land. For example in Arizona the legislation applies to "agricultural, range, open space, park, flood control, mining, forest or railroad lands and any other similar lands, wherever located, which are available to a recreational or educational user...",[41] while in Iowa only holders of "abandoned or inactive surface mines, caves, and land used for agricultural purposes, including marshlands, timber, grasslands and the privately owned roads, water, water courses (and) private ways..."[42] are entitled to the liability limitation. Although the states that limit the types of land to which recreational use legislation applies are in the minority, we have noted that some courts in jurisdictions without such limitations have attempted to create their own.[43]

i. Urban Land versus Rural Land

[51] Some recreational use legislation draws a distinction between rural land and urban land. Although this may be an easy determination to make in some cases, it

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[38] Bill 220, *supra* note 14 defined agricultural land as
(a)...land the use of which for agriculture
(i) is either a permitted or discretionary use under the land use by-law of the municipality in which the land is situated, or
(ii) is permitted pursuant to section 643 of the *Municipal Government Act*.

[39] R.S.A. 1980, c. L-5.

[40] "Recreational trails", "golf courses when not open for playing" and "recreational facilities when closed for the season" are some obvious exceptions.

[41] ARIZ. REV. STAT. ANN. § 33-1551.C.3 (Supp. 1999).

[42] IOWA CODE ANN. § 461C.2.3 (West 1997).

[43] It should also be kept in mind that some jurisdictions limit the application of recreational use legislation in other ways such as by the recreational activities that are covered. These other types of limitations are discussed in the other sections in this chapter.

is the type of imprecise description that could lead to uncertainty in the application of the statute if left undefined.

[52] At its simplest level the distinction between urban and rural lands is between lands situated in a city and land located in the country.[44] So one possibility would be to apply recreational use legislation to areas located outside of the boundaries of a city, town or village.[45] This approach has the advantage of making the application of the recreational use legislation easy to determine. However, the rationale behind a distinction between urban and rural areas is not based on geographical niceties. In fact, this type of distinction does not make sense if the sole purpose of the legislation is to encourage access to land for recreational purposes. There may be land located within urban areas that is well suited for recreation and similar in nature to its rural counterpart. To some extent this type of lands is even more desirable for recreational use because it is more easily reached by people in population centres wishing to engage in recreational activities.

[53] If a distinction is going to be made on the basis that the terms "rural" and "urban" connote certain characteristics, then using those terms makes more sense. However, the terms should be clearly defined or used in conjunction with other descriptions that make their application clear. As well, given that there may be lands in urban areas that share characteristics with some rural lands, it seems unlikely that this distinction could effectively be used as the sole criterion for applying a recreational use provision. The Canadian jurisdictions that have recreational use provisions refer to "rural premises" in listing the premises to which the provisions apply although this phrase is generally used in conjunction with other distinguishing characteristics.

ii. Developed vs. Undeveloped; Improved vs. Unimproved

[54] Most US courts have tried to develop criteria for the application of recreational use legislation that do not rely solely on the location of land inside or

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[44] *Whaley* v. *Hood*, [1998] O.J. No. 1785, online: QL (OJ), is one of the few Canadian decisions interpreting recreational use legislation. Faced with the issue of whether the land was rural land within the meaning of the Ontario recreational use provision, the Court turned to the Concise Oxford Dictionary, Eighth edition which defines rural as " in, of, or suggesting the country (opp. URBAN); pastoral or agricultural." (at para. 22).

[45] Missouri appears to be the only state that uses this distinction. MO. ANN. STAT. § 537.348(3)(a) (Vernon 1988).

outside of an urban area, but on the nature of the land itself. This is a recognition that the rural/urban distinction really represents a distinction between large tracts of land which tend to be difficult to monitor and maintain or to place "off limits", and small parcels of land that are residential or developed for commercial purposes, and whose vicinity to a large population make it more likely that people may wander onto them, unintentionally or otherwise.

[55] Terms like "undeveloped" or "unimproved" have been used to try to differentiate between lands that are appropriately included within the ambit of recreational legislation and those that are not. Generally speaking developed lands will be easier for occupiers to supervise and maintain. Entrants to developed or improved lands may justifiably have higher expectations that those premises are safely maintained. Land under development may pose unexpected and hazardous conditions which warrant imposing some obligation on the occupier to minimize the potential for accidents to persons lawfully on the premises.[46]

[56] Of course this type of distinction can also lead to some anomalous results. The type of development or improvement may not materially affect the nature of the land under development. Golf courses provide a good example. During the off-season they may provide ideal areas for certain types of recreation. Some developments or improvements enhance the recreational use of lands by providing access, shelter or other conveniences incidental to that use.[47] The type of development as well as the current state of development of the premises will greatly affect the ability of the occupier to monitor and maintain those premises in

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[46] This type of distinction may also reflect environmental concerns. In *Harrison* v. *Middlesex Water Co.*, 403 A.2d 910 at 914 (N.J. 1979) the court stated "(t)he public policy to afford these property owners a modicum of protection from tort liability may be thought of as one which would encourage such owners to keep their land in a natural, open and environmentally wholesome state. This is an important policy in view of the substantial and seemingly relentless shrinkage and disappearance of such land areas from the face of our State. It is a concern well known to our Legislature."

[47] See *Diadato, v. Camden County Park Comm'n*, 392 A. 2d 665 (Super. Ct. N.J. 1979) where the court applied recreational use legislation to a county park containing various "improvements" because the improvements were mere conveniences or facilities incidental to the recreational use of the park; *Keelen*, *supra* note 33, where improvements incidental to the use of land for recreational purposes did not themselves take the property out of a rural undeveloped classification; *Yanno*, *supra* note 33, where the court stated that the extent of improvement was one factor to consider, but that the recreational use legislation did not assign nor withhold immunity on that basis.

a safe condition, as will the location of the premises, its size, its accessibility and its proximity to major population centres.

iii. Natural vs. Artificial

[57] In discussing the types of land to which recreational use legislation should apply, US courts frequently refer to the types of recreational activities specifically enumerated in the legislation and assess what types of land would be suitable for those activities. This examination has led some courts to assess whether the land in question could be considered "true outdoors" or whether the conditions on the premises are natural or artificial. Again, this categorization seems straightforward, but there are situations that will lead to inconsistent results. Where an artificial condition is similar to a natural condition and poses the same risk (for example a man-made lake), it makes little sense to treat the owner of the land upon which the artificial condition is located differently than an owner of land upon which the condition occurs naturally.

iv. Primary use of land

[58] Another factor that could be taken into account in identifying land to which recreational use legislation should apply is the primary use of the land. This approach is taken in the other Canadian provinces. For example, the recreational use provisions in British Columbia and Nova Scotia refer to premises primarily used for agricultural purposes. The Ontario and PEI legislation applies to premises that are used for agricultural purposes (with the added requirement that these be rural premises).

[59] Identifying lands by their primary use is a variation on the rural/urban distinction. Lands primarily used for agriculture or forestry are the types of lands that may be suitable for recreation, but which may be difficult to inspect or maintain in a safe condition. However, there may be another rationale for this approach. There is no need to increase access to lands which have specifically been set aside for non-commercial recreational purposes (such as public parks or recreational areas), so there is arguably no need to apply the recreational use provisions to these lands or to any other lands whose primary purpose is already recreation.[48]

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[48] The Law Reform Commission of British Columbia suggested yet another rationale for choosing

(continued...)

[60] This logic holds true if the occupier of the premises cannot change the primary purpose for which the land is to be used. However, if the occupier has the ability to change this use, then continued access remains a concern. Furthermore, occupiers who do not make use of undeveloped lands, but who make allowances for public recreational use, face the same problems in monitoring and maintaining those premises as occupiers of agricultural or forestry lands and presumably might deny access unless given the same protection.

v. General Observations

[61] A number of considerations are relevant in deciding what types of premises should be included in the application of a recreational use provision. In the first instance, recreational use legislation should only apply to premises that are amenable to recreational use.[49] Secondly, there is no need to increase access to areas that are and will always be open to the public for recreational use, nor is there any need to increase access to areas that are not under demand for recreational purposes. The more information about the types of areas that are under demand for recreational access that can be collected, the more precisely the legislation can be tailored to achieve its purpose.

[62] Certain types of premises could be excluded from consideration on the basis that their occupiers have other means of protecting themselves by entering into contractual arrangements with NCRUs.[50] These premises might include

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[48] (...continued)
primary purpose as a criterion:

> Rather than adopting the Ontario model of relaxing the occupier's duty of care in relation to rural areas and a few other types of premises, it is preferable to relax it in relation to premises not designated for recreational use. Premises that are so designated should be suitable for recreational activities. When recreationists enter premises not intended for recreational use, they should bear a greater burden to look out for their own safety.

(Law Reform Commission of British Columbia, *Consultation Paper on Recreational Injuries: Liability and Waivers in Commercial Leisure Activities*, Consultation Paper No. 70 (Vancouver: The Commission, 1993) at 61.

The recommended provision was not the provision that was adopted in the *OLA*. See Law Reform Commission of British Columbia, *Report on Recreational Injuries: Liability and Waivers in Commercial Leisure Activities*, LRC 140 (Vancouver: The Commission, 1994) at 64.

[49] As noted above, depending on the scope of recreational activities, this may not be a meaningful limitation.

[50] Section 8 of the *OLA* specifically provides that the liability of an occupier to a visitor may be
(continued...)

commercial facilities whose owners might be prepared to allow access without charge to certain users or self-contained private recreational facilities such as swimming pools or riding arenas.[51]

[63] If some occupiers deny access because of liability concerns, this may be as a result of their perception of the law, rather than what the law actually is. It may also be the case that occupiers of certain types of premises are more likely to see the common duty of care as an onerous duty and may therefore be less likely to grant access. It follows that the size of the premises, is accessibility, the cost of inspecting the premises on a regular basis and the cost and likely effectiveness of steps to make the premises safer may also be relevant in considering the types of lands to which recreational use provisions should apply.

[64] The rationale that was put forward for the list of lands contained in the Ontario legislation is as follows:

> The types of lands designated exhibit characteristics which make it reasonable that the recreational entrant assume his own risk. Such lands do not generally pose extraordinary or unexpected dangers to users, although undoubtedly some risks are involved. Indeed, the recreational entrant who is engaged in adventuresome activities such as rock climbing may be seeking some element of risk. These risks are expected. Wilderness and undeveloped land are such that an occupier cannot reasonably be expected to tend them in order to prevent injury to an entrant. Persons who enter on these lands for recreation are seeking the solitude that such lands provide and not the activities that can be found in a safe public park.[52]

Thus, another factor that may be relevant to this discussion is the reasonable expectations of NCRUs.

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[50] (...continued)
restricted, modified or excluded by express agreement or express notice where reasonable steps were taken to bring the restriction, modification or exclusion to the attention of the visitor. However, the agreement or notice must make it clear that the occupier will not be liable for injuries or loss even arising out of their own negligence: *Murray* v. *Bitango*, (1996) 38 Alta. L.R. (3d) 408 (C.A.).

[51] The same result could be achieved by introducing restrictions based on something other than the type of premises. For example, commercial facilities can be excluded from the operation of recreational use legislation by imposing limitations on the nature and amount of compensation the occupier can receive and still take the benefit of the discussion. See section 5 on compensated use below at 63.

[52] Ontario, Ministry of the Attorney General, *supra* note 4 at 10.

[65] Where premises have been developed specifically for recreational purposes or where access can be controlled and the land is easily monitored, inspected and maintained this may well create the expectation in an NCRU of reasonable safety. Imposing a common duty of care in these circumstances is in accordance with this expectation, and would not appear to be an unreasonable burden on an occupier. However, where NCRUs seek access to large areas of undeveloped land that are not intended for recreational use they should not expect that those lands will be monitored, inspected and maintained in a reasonably safe condition for that use. Furthermore, in these circumstances it seems unlikely that the occupier is in a much better position to judge the safety of the premises than the NCRU.

[66] So, the reasonable expectations of the NCRU and the occupier's ability to monitor, inspect and maintain their premises and to control access to those premises are all considerations in identifying the appropriate lands to include within the ambit of recreational use legislation. Imposed onto all of this is the requirement that the lands be identified with sufficient certainty that both NCRUs and occupiers will know when the recreational use legislation will apply.

d. Applying the Legislation to Specific Types of Premises

[67] There may be specific types of lands in Alberta that are giving rise to access issues. Apparently, public lands that are the subject of agricultural dispositions represented one such example.[53]

[68] We have been made aware of two other types of land that may be giving rise to access issues in Alberta. Promoters of the Trans Canada Trail have suggested that liability concerns are hampering the progress of the Trail across privately owned rural land.[54] Similar concerns led to the introduction of recreational use provisions in British Columbia. The discussions in the BC Legislature indicate that the main purpose of that legislation was to facilitate the creation of the Trans

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[53] Alberta, Agricultural Lease Review Committee, *Agricultural Lease Review Report* (Edmonton: Government of Alberta, 1998) at 6-7.

[54] L. Gregoire, "Legal Hitch Slows Progress of National Trail Through Alberta" *The Edmonton Journal* (10 Sept. 1999) B1.

Canada Trail.[55] In fact, all four provinces with general recreational use provisions in their occupiers' liability legislation include recreational trails as one type of land to which the provisions apply.[56]

[69] A second example that was specifically brought to our attention is irrigation districts, whose representatives have expressed liability concerns for injuries occurring in irrigation canals or reservoirs. As we understand it, much of the concern is because where the irrigation districts are aware of recreational users who are trespassers and would like to prevent this use, they are often unable to do so for practical reasons. They are therefore concerned about consent to recreational use being implied and resulting exposure to liability which they cannot avoid.[57]

[70] In order to determine whether there are specific types of land which may be appropriate for inclusion in recreational use legislation, it is necessary to have adequate information as to the nature and extent of any access problems to that land. It is also necessary to consider whether the characteristics of that land are such that their inclusion in recreational use legislation is consistent with the broader objectives of occupiers' liability law. If specific categories of land are chosen, the categories must be described in a fashion that will make them easily identifiable so that occupiers and NCRUs will know when the reduction in liability will apply to them.

e. *Types of Premises–Basic Choices*

[71] It seems reasonable that at a minimum recreational use legislation should only be applied to lands which are under demand for recreational use and to which NCRUs currently have limited or no access. Further limitations may well be

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[55] British Columbia, Legislative Assembly, *Debates* (11 May 1998) at 7681.

[56] The Ministry of the Attorney General relied to a large extent on a report of the Ontario Trails Council in recommending the adoption of recreational use provisions in Ontario, *supra* note 4. Although trails are specifically referenced in the recreational use provisions in British Columbia, Ontario, Nova Scotia and PEI, they are also the subject of separate legislation in Nova Scotia and in various states in the US. Trails give rise to a variety of liability issues, many of which would not be addressed by the proposed amending legislation. A discussion of issues specific to trails is beyond the scope of this report, but has been dealt with elsewhere: see "Occupier's Liability, Trails and Incentives", *supra* note 3.

[57] *Final Report and Recommendations of the Irrigation Act Review Committee*, Government of Alberta, March 9, 1998. The issue of implied permission is discussed in Appendix B at 101.

justified for policy reasons. As stated at the outset, we do not have sufficient information to make specific recommendations about the types of premises to which any amending legislation should apply. However the overall impact of any reform will depend greatly on the types of premises to which it applies.

[72] A narrow recreational use provision would apply only to very specific and distinct types of lands that could be clearly identified by description (eg. private roads marked as such, golf courses when not open for playing). These could be lands which have a primary use other than recreation, or they could be lands that would be specifically set aside for non-commercial public recreational use in exchange for the relaxation of liability provided for in the legislation (eg. designated trails, recreational leases). Taking a narrow approach to the type of lands to which a recreational use provision would apply provides certainty. Arguably, this approach most clearly advances the objective of recreational use legislation to promote access to areas which are giving rise to access problems.

[73] The downside of a narrow approach is the potential exclusion of lands that are not capable of easy definition, but which are desirable recreational lands. It might be preferable to include land which can only be identified by general characteristics such as location, state of development or primary use. This intermediate approach is one taken in other Canadian jurisdictions which include lands identified by characteristics (eg. forested or wilderness lands) as well as by primary purpose (eg. premises used for agricultural purposes) or a combination of characteristics and location (eg. rural premises that are vacant or undeveloped). This type of approach may open up access to more areas. The tradeoff is the increased uncertainty for an occupier as to whether or not the recreational provision will apply and the possibility of inconsistent court interpretations, which may cause occupiers to deny access to NCRUs.

[74] Finally, the legislation could apply to all lands currently encompassed by the *OLA* or to all such lands which are suitable for recreational use. While applying the recreational use provisions without limit may be consistent with the purpose of the proposed legislation, there is a corresponding risk that this could lead to undesirable consequences. The experience in the United States suggests that if no limitations are placed on the legislation, there is a strong possibility that the courts

will impose their own limitations. This fosters uncertainty about the application of the legislation and therefore undermines its objective of increasing access.

2. Types of Occupiers

a. *Private v. Public*

[75] We are proceeding on the assumption that any recreational use legislation would apply to private occupiers, but whether public entities should have the benefits of a recreational use provision should be considered carefully. National and Provincial parks and unpatented Provincial lands comprise a significant proportion of undeveloped land in Alberta.

i. Reform Under the ADSAA

[76] The *ADSAA* alters the liability of the holder of an agricultural disposition issued under the *Public Lands Act*. There is no distinction drawn between private disposition holders and public disposition holders. The *ADSAA* does not purport to alter the liability of the Crown as occupier of an agricultural disposition. If there are circumstances in which the Crown is an occupier of an agricultural disposition, the duty owed by the Crown to permitted NCRUs would appear to remain the common duty of care, notwithstanding a reduction in the duty owed by the disposition holder.

ii. Federal Crown

[77] The *OLA* has been applied to the Federal Crown through s. 3(1)(b) of what is now the *Crown Liability and Proceedings Act*: [58]

> 3(1) The Crown is liable in tort for the cases for which, if it were a private person of free age and capacity it would be liable...
>
> (b) in respect of a breach of duty attaching to the ownership, occupation, possession or control of property...

The effect of this section is that where an injury occurs on land in Alberta occupied by the Federal Crown, its liability is determined in accordance with the Alberta law of occupiers' liability (and thus the *OLA*).[59]

[78] The various policy considerations in applying recreational use provisions to public bodies is dealt with in the next section. The same considerations would

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[58] R.S. 1985, c. C-50.3.

[59] *Stuart* v. *Canada*, [1989] 2 F.C. 3 (T.D.).

apply in relation to the Federal Crown as to the Provincial Crown. However, if an Alberta recreational use provision purported to exclude the Federal Crown from its operation where the provision would otherwise apply, we do not think that it would actually achieve this result. The *Crown Liability and Proceedings Act* requires that the liability of the Federal Crown in occupiers' liability cases be determined as if it were a private person. Quite apart from the question of whether provincial legislation could actually bind the Federal Crown,[60] the wording of the provision would appear to effectively prevent the Province from drawing a distinction between the Federal Crown and other occupiers based purely on status.[61]

iii. Provincial Crown

[79] In Alberta the *OLA* specifically binds the Provincial Crown.[62] Therefore, any limitation of liability inserted into the Act would automatically apply to the Provincial Crown as well, unless otherwise specified.

[80] None of the Canadian provinces with recreational use provisions in their *OLA* specifically exclude the application of those provisions to Crown land.[63] In the United States, whether recreational use legislation should apply to land owned by state governments is the subject of much litigation. In some jurisdictions the legislation specifically applies to privately-owned land or "lands other than lands owned by the government",[64] but the majority of statutes do not specify whether or not the land must be privately-owned in order for the legislation to apply. Where there is no indication in the recreational use statutes themselves, some courts have

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[60] Alberta Law Reform Institute, Report 71, *The Presumption of Crown Immunity* (Edmonton: ALRI, 1994) at 133.

[61] This is how the US *Federal Tort Claims Act*, which contains a similar provision, has been interpreted in relation to the Federal Government in the US: *Ravell* v. *United States*, 22 F.3d. 960 (Cal. 1994).

[62] *Supra* note 1, s. 16.

[63] Although all of these provisions grant limited liability to landowners who receive payments from a government or government agency in exchange for access. This is discussed further in the section dealing with compensated use at 63-70, below.

[64] See for example OHIO REV. CODE ANN. § 1533.18(A) (Anderson 1997); MINN. STAT. § 604 A. 21 (Supp. 1999); HAW. REV. STAT § 520-2 (Supp. 1998).

held that the legislation applies to public lands as well.[65] This is so even where the statutes in question were based on the 1965 Model Act which was aimed at increasing access to *private* lands.[66]

[81] Since the objective of the proposed recreational use legislation is to increase access to lands for recreational purposes, it might not seem important whether the lands made available for recreational use are owned privately or not. But some different considerations arise when considering access to public lands.

[82] There may be a perception that the public automatically has a legal right of access to "public lands". We think that the legal basis for such a conclusion is far from clear.[67] However, if there are certain Crown Lands to which the public has rights of access for recreational use, then there is no point in applying recreational use provisions to those lands as a means of encouraging access.

[83] Regardless of the legal position, the Provincial Crown in fact allows access to many public lands and sets aside some of these lands specifically for recreational use. It could be argued that there is no need to apply recreational use provisions to these lands either, because this would not increase access, and NCRUs would be giving up their current rights without receiving any benefit in

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[65] It should be noted that some states have legislation similar to the Federal Tort Claims Act governing the liability of the state government.

[66] 1965 Model Act, *supra* note 17. The commentary prefacing the model legislation includes the following:

> Recent years have seen a growing awareness of the need for additional recreational areas to serve the general public. The acquisition and operation of large outdoor recreational facilities by governmental units is on the increase. However, large acreages of private land could add to the outdoor recreation resources available. Where the owners of private lands suitable for recreational use make it available on a business basis, there may be little reason to treat such owners and the facilities they provide in any way different from that customary for operators of private enterprises. However, in those instances where private owners are willing to make their land available to members of the public without charge, it is possible to argue that every reasonable encouragement should be given to them...
>
> The suggested act which follows is designed to encourage availability of private lands by limiting the liability of owners to situations in which they are compensated for the use of their property and to those in which injury results from malicious or willful acts of the owner... (at 150).

[67] For a more detailed discussion of public rights of access to Crown Lands see Appendix A at 82-86, below.

exchange. Again, as long as no decision can be made to remove this public access, this argument is unassailable. In fact, limiting liability could have a negative effect because public areas that were previously safe for recreational purposes might be allowed to deteriorate without the deterrent effect of the current law.

[84] There is no such argument in relation to public lands that are not currently accessible. As with private lands, it is conceivable that limiting liability might act as an incentive to open these lands to public use. However it is an important question whether this type of legislation is the appropriate mechanism to increase access to Crown Lands, particularly where the government already purports to follow a policy of land use that includes recreation. Increased access to public lands could be achieved much more directly. In fact, if the government has a responsibility to provide recreation areas to the public and is therefore required to make land available anyway (an argument which has been made in the U.S.), then applying limited liability to the Crown in order to encourage the provision of recreational areas is completely illogical.

[85] As a matter of policy, it may be argued that public entities are in a better position than owners of private lands to carry the burden of the costs of injuries caused by their negligence, and to distribute those costs. Shifting the risk of injury for negligent acts from a private occupier to an individual NCRU in exchange for recreational access, may be more easily justified than shifting the risk from the government to the same NCRU. If the appropriate balance between promoting access and shifting risk is different in relation to publically owned lands than privately owned lands, it may be more difficult to justify a reduction of the common duty of care simply on the basis of the possibility of increased recreational access.

[86] On the other hand, public occupiers have many of the same liability concerns as private occupiers, particularly when it comes to premises which are easily accessible, large and difficult to monitor. If these liability concerns are used to justify decisions not to open certain types of Crown land to the public, or to close areas that were previously accessible, then the objective of increased recreational access may be sufficient to justify applying recreational use legislation to the Crown.

[87] The Nova Scotia *Trails Act*[68] represents an interesting approach to the issue of the liability of the provincial Crown as an occupier or premises. The *Trails Act* was passed to assist in establishing trails on both public and private land. It provides a means by which a trail may be designated on Crown land, provides for Crown Land to be set aside for the purpose of a trail and allows for the acquisition of land by the Crown for the purposes of a trail. The *Trails Act* also provides a mechanism by which private land owners can consent to a trail being established on their land. Trail users are deemed to have voluntarily assumed the risks that may be encountered on the land when using a trail and the liability of the Crown and other owners and occupiers of trails is limited to the creation of a danger with the deliberate intent of doing harm. In these circumstances, the Crown is actually assuming responsibility for creating recreational trails as a means of increasing access to land for recreational purposes and the tradeoff for their liability reduction is clear.

iv. Other Public Entities: Municipal Corporations/ School Districts etc.

[88] Many of the issues raised in the previous section would apply to other "public" entities as well. In deciding whether recreational use legislation should be limited to private owners, consideration should be given to the impact this might have on such entities.

[89] None of the Canadian jurisdictions specifically exclude or include public bodies such as municipalities from the application of their recreational use legislation. As long as these entities have the same rights and duties as any other legal person, they would appear to be entitled to the relaxed duty created by the legislation. In practical terms, this will lead to different results depending on the types of land owned by the public body and where that land is located. For example, since Canadian recreational use provisions tend to apply to rural land, rural municipalities are more likely to benefit from the legislation than are urban municipalities.

[90] Whether recreational use legislation should apply to local governments is an issue that has been litigated in the United States with varying results. The development of recreational use legislation in the context of the need for additional

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[68] S.N.S. 1988, c. 20.

private lands for recreation and the corresponding policy arguments have led some courts to conclude that county and municipal governments should not receive the benefits of the legislation.[69] Other courts have decided that municipalities should benefit from recreational use statutes to the same extent as private occupiers.[70]

[91] Presumably municipalities, school districts and other similar entities have liability concerns arising out of the use of their land. However, we do not know if this is affecting their land use decisions and we have no information as to whether recreational users are experiencing difficulty in obtaining access to land with recreational potential occupied by such entities.

[92] As long as recreational users do not have the legal right to enter certain premises, the possibility of gaining access to those premises can be argued as a basis for applying recreational use legislation. Where the owners of the premises are public entities, considerations such as their ability to spread costs and their responsibility to provide safe recreational areas to the public should be balanced against the desire to promote access.[71]

v. Private v. Public Occupiers–Basic Choices

[93] A decision should be made as to whether the proposed recreational use amendment will apply to public occupiers as well as private occupiers, bearing in mind the policy issues highlighted in this section.

[94] A narrow recreational use provision would explicitly apply only to privately-owned lands. Since there is clearly no legal right of access to private lands unless there is consent, the policy basis for lowering the duty of private occupiers is arguably more straightforward than it is in relation to public occupiers.

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[69] See *Conway v. Town of Wilton*, 680 A.2d 242 (Conn. 1996) and the cases referred to at 254.

[70] See for example: *Brinkman v. Toledo*, 611 N.E.2d 380 (Ohio 1992); *City of Virginia Beach v. Flippen*, 467 S.E.2d 471 (Va.1996); *Ervin v. City of Kenosha*, 464 N.W.2d 654 (Wisc. 1991).

[71] We note for example that the *Municipal Government Act*, R.S.A. 1980, c. M-26 states that the purposes of a municipality include:

> 3(b) to provide services, facilities or other things, that in the opinion of council are necessary and desirable for all or part of the municipality, and
> (c) to develop and maintain safe and viable communities.

[95] An intermediate approach might exclude or include certain public entities depending on how the policy issues are balanced in relation to those particular entities.

[96] The broadest approach would be to apply the legislation to all occupiers regardless of their identity. Limitations on the application of the statute could still be achieved through the other means outlined in this chapter.

b. Occupiers' Responsibility to Grant Public Access

[97] A recreational use provision has the potential to increase access to land in Alberta for recreational purpose for two reasons. First of all, if the liability risk in relation to NCRUs who are permitted onto premises is the same as the risk in relation to trespassing NCRUs, an occupier no longer has to worry about the consequences of a finding of implied permission.[72] So landowners who have no objection to NCRUs using their property aside from potential liability have no reason to take steps to exclude them. Secondly, an occupier can give express permission to use premises without being held to a higher duty of care than if consent were withheld. If an occupier would allow recreational access were it not for liability concerns, then this change makes it more likely that they will do so.

[98] However, there is no guarantee that occupiers will actually grant access as a result of the proposed amendment to the *OLA*. Any anticipated increase in access to land for recreational use is premised solely on the assumption that there are occupiers who would unilaterally permit recreational use on their premises if their liability were reduced. To address this issue some jurisdictions have imposed a requirement that an occupier must make their premises generally accessible to the public in order to gain the benefit of the reduced liability.

i. Reform Under the ADSAA

[99] The amendment to the *OLA* under the *ADSAA* was made in conjunction with a number of amendments to the *Public Lands Act*. One of these amendments, section 59.1, imposes a requirement on agricultural disposition holders to allow

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[72] Implied permission is discussed in Appendix B at 101, below.

reasonable access to that land for recreational purposes.[73] Under the *OLA*, the disposition holder's reduced duty only applies in relation to entrants who enter and use their premises under section 59.1. In this way, the reduced liability is tied to a public access requirement.

[100] Of course the *ADSAA* differs from other recreational use legislation in its restriction to specific types of *public* lands. Presumably the reduction in liability was given to disposition holders in recognition of the new access requirement, although the access requirement could have been enacted without a corresponding reduction in liability.

ii. Other Jurisdictions

[101] The recreational use provisions in the other Canadian provinces do not contain any express requirement that an occupier make their premises available to the recreating public generally, or in fact, to any NCRU at all. In British Columbia, Ontario and PEI anyone who enters certain premises for the purpose of a recreational activity without payment is deemed to have willingly assumed all risks of that entry.[74] It is not stated whether or not this entry has to be with the occupiers' consent. In the end result this is not significant because trespassers to any of the enumerated premises are also deemed to have assumed all risks[75] so that all NCRUs are caught by the limited liability provisions.

[102] In Nova Scotia, anyone who enters the types of premises listed in the legislation is deemed to have willingly assumed all the risks.[76] Again, it is not

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[73] *Supra* note 11. "Reasonable access" is to be allowed in accordance with the regulations, *ibid.*

[74] B.C. *OLA*, *supra* note 15 s. 3(3.2); Ont. *OLA*, *supra* note 15 s. 4(3); P.E.I. *OLA*, *supra* note 15 s. 4(3).

[75] The B.C. act deems entrants who are trespassing to have assumed all risks. The Ontario and P.E.I. acts apply the deeming provisions to entrants to premises where entry is prohibited under the *Trespass to Property Act*, and where the occupier has posted no notice in respect of entry and has not otherwise expressly permitted entry, *ibid.*

[76] N.S. *OLA*, *supra* note 15 s. 6(2). There are certain exceptions to this which include: 6(3)(a) a person who enters premises for a purpose connected with the occupier or any person usually entitled to be on the premises; (b) a person who has paid a fee for the entry or activity of the person; (c) a person who is being provided with living accommodation by the occupier for consideration; (d) a person authorized or permitted by any law to enter or use the premises for other than recreational purposes.

expressly stated whether or not the occupier's consent is required in order for the recreational use provision to apply. However, if consent was required for the provision to apply, a trespassing NCRU would be owed a higher duty than a permitted NCRU and this cannot be the intended result.

[103] Varying approaches to the issue of a public access requirement have been taken in US jurisdictions. The 1965 Model Act did not contain an express provision requiring that an occupier open their premises to the public in order to benefit from the legislation. However, in some jurisdictions the courts interpreted the legislation to require public access, relying on the wording of certain provisions and the fact that the stated purpose of the legislation was to "encourage owners of land to make land and water available to the *public*...".[77] Thus in *Gibson v. Keith* the court concluded that a landowner who "undertook affirmatively to warn or to bar the public from entry could not assert the statute as a bar to a tort claim brought by a person who has entered the premises either with knowledge or disregard of the owner's efforts to keep the public out."[78]

[104] Other US courts have refused to imply a requirement of public access from similarly worded provisions. Those courts have relied on the fact that the legislation does not contain an express requirement to that effect. In addition, it was concluded that implying the requirement was unreasonable because no landowner would be prepared to allow all persons to use the property at all times and allowing any limitations to be placed on access would create uncertainty as to whether or not the provision applied in any given case.[79]

[105] A few US jurisdictions have chosen to include an express requirement in their recreational use legislation that an occupier grant public access to their

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[77] *Supra* note 17, ss 3, 4 and preface (emphasis added). Section 4 refers to an owner of land who "either directly or indirectly invites or permits..." any person to use the premises for recreational purposes.

[78] 492 A.2d 241 (Del. 1985) at 244 (however this decision was superseded by an amendment to the legislation in 1989 to provide that the act applied whether or not the recreational user entered upon the land with the consent of the owner). A similar decision in *LePoidevin* v. *Wilson*, 330 N.W.2d 555 (Wis. 1983) was also superseded by legislative amendments. See also *Herring v. Hauck*, 165 S.E.2d 198 (Ga. Ct. App. 1968) and *Perrine* v. *Kennecott*, 911 P.2d 1290 (Utah 1996).

[79] *Johnson v. Stryker Corp.*, 388 N.E.2d 932 (Ill. App. Ct. 1979); *Friedman v. Grand Central Sanitation*, 571 A2d. (Pa. 1990); *Wymer supra* note 33.

premises in order to gain the benefit of the legislation.[80] In Alabama, the legislation not only includes a public access requirement, but also sets out how this requirement is to be met:

> (a) the liability limitation protection of this article may only be asserted by an owner who can reasonably establish that the outdoor recreational land was open for non-commercial use to the general public at the time of the injury to a person using such land for any public recreational purpose. Any owner may create a rebuttable presumption of having opened land for non-commercial public recreational use by:
>
> (1) Posting signs around the boundaries and at the entrances of such land;
>
> (2) Publishing a notice in a newspaper of general circulation in the locality in which the outdoor recreational land is situated, and describing that land; or
>
> (3) Recording a notice in the public records of any county in which any part of the outdoor recreational land is situated, and describing such land;
>
> (4) Any act similar to subdivision (1)(2) or (3) of subsection (a), which is designed to put the public on notice that such outdoor recreational land is open to non-commercial public recreational use.[81]

[106] In some U.S. jurisdictions, limited liability is granted to owners of land who have agreed to set that land aside for public recreation through an access covenant, conservation easement, public use easement or some other agreement with the government. This reduced liability may be provided for in the main recreational use statute, or in separate legislation.[82]

iii. General Observations

[107] A public access requirement aims to ensure that the goal of recreational use legislation to increase public access to premises is met. In addition, such a requirement precludes the application of the legislation to landowners who do not

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[80] For example, the Connecticut legislation applies where "...the owner of land ... makes all or any part of the land available to the public..." CONN. GEN. STAT. ANN. § 52-557g(a) (West 1991). In Florida, the act refers to an owner "...who provides the public with a park area or other land for outdoor recreational purposes..." FLA. STAT. ANN. § 375.251(2)(d) (West 1997) and in Mississippi to "..(an) owner who opens a land or water area to the public for outdoor recreational purposes.."MISS. CODE ANN. § 89-2-1 (1999).

[81] ALA. CODE § 35-15-28(a) (1991).

[82] An example of the former is TENN. CODE ANN. § 11-10-103 (1999). An example of latter is N.J. STAT. ANN. § 13:1B-15.141 (West 1987).

allow recreational access to the general public or at all.[83] In theory this appears to make sense. However, whether imposing a public access requirement will increase access is not evident. Furthermore, applying such a requirement in practice poses some significant problems.

[108] In the first place a public access requirement injects an element of uncertainty into the application of recreational use legislation. If an NCRU is injured, the occupier has to show that the premises had been made available to the public. Whether or not they will ultimately be successful in proving this remains an unknown factor in the application of the legislation. Introducing a rebuttable presumption reduces, but does not eliminate this uncertainty. Further problems arise in determining the steps that should be required by an occupier to raise this presumption. For example, if signs are required, then there should be some indication of what information is required on the sign, how many signs are needed and where they should be located. Consideration would also have to be given to the responsibility of the occupier to inspect and maintain the signage and the potential expense to the occupier.

[109] Secondly, requiring an occupier to allow unlimited public access as a means of reducing their liability is likely to negate any perceived benefit of the legislation. Even occupiers who are in favour of public recreational use are likely to balk at the possibility of having recreational users on their premises at any hour of the day. So if a public access requirement were included in recreational use legislation, it would seem necessary to allow an occupier to impose some limitations on public recreational use.

[110] Even a limited public access requirement is likely to decrease the amount of public access that might otherwise be gained through the introduction of recreational use legislation. If trespassers and NCRUs are both owed the same duty under the new Act, the possibility of losing even some control over access might cause occupiers to exclude NCRUs altogether. Although the occupier might still have to worry about the risk that a trespasser might be found to have implied

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[83] Excluding social guests from the application of recreational use legislation might be an alternate way of dealing with the concern that an occupier who allows very limited access should not get the benefit of the statute. The issue of social guests is discussed at 60-63, below.

permission to enter the premises, this risk may well be preferable to the loss of control over access to the premises.

[111] If limitations on access are allowed, then this creates a new set of problems. What types of limitations should be allowed? How are these limitations to be defined? One solution might be to allow "reasonable" restrictions in relation to such things as time, place and manner of public use.[84] But this adds a significant degree of uncertainty to the application of the recreational use provisions. There is no means for an occupier to ascertain whether their limitations are reasonable.

[112] All of the above considerations may well explain why a public access requirement this is not a requirement that is adopted in any Canadian occupiers' liability legislation, and is only adopted in a few jurisdictions in the U.S.

iv. Public Access Requirement- Basic Choices

[113] Requiring occupiers to grant access to the general public in order to benefit from recreational use legislation is one option to be considered. This choice involves consideration of subordinate issues such as how the general access requirement is to be met. It should be borne in mind that imposing a general public access requirement may actually have the effect of discouraging occupiers from granting any recreational access, and so defeat the objective of the legislation.

[114] Allowing an occupier to put reasonable limitations on public access is a second possibility. It will then be necessary to consider giving guidance as to what reasonable limitations might be and how an occupier can impose those limitations.

[115] None of the provinces with recreational use provisions impose a requirement that the occupier permit public access. This is the third option. In the result, even an occupier who actively discouraged public access would be entitled to a reduction of liability as against individual NCRUs invited to or permitted on their premises.

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[84] This is the approach taken in the draft regulations under the *ADSAA*. See *Discussion Document on Draft Regulations*, *supra* note 11.

3. Types of Recreational Activities

[116] If the purpose of amending the *OLA* by relaxing the duty owed by occupiers to certain entrants is to increase the amount of land available for recreational use, then it seems obvious that the legislation should contain some sort of reference to recreation.[85] This assumption is reflected in our use of the term "NCRU" to describe the group of entrants to which the proposed legislation would apply. Unfortunately, the identification of an entrant to premises as a recreational user is not as straightforward as it might seem. This section raises some of the issues that should be considered in formulating a recreation requirement.

a. Reform Under the ADSAA

[117] The amendment to the *OLA* created by the *ADSAA* applies to persons who, under section 59.1 of the *Public Lands Act*, enter and use land subject to an agricultural disposition. Under section 59.1 the holder of the disposition shall, in accordance with the regulations, allow access to the land to persons who wish to use it *for recreational purposes*. In this way the *OLA* amendment does indirectly contain a recreational use requirement in relation to public lands held under agricultural dispositions. There is no definition of recreational purposes in the amendment to the *OLA* or in the *ADSAA*, and it appears that this will be in the regulations passed under the Act.[86]

b. Applying the Legislation to all Recreational Activities

[118] The most logical starting point for a discussion of this issue is to return to the basic objective of the proposed legislation: to increase access to premises for non-commercial recreational use. We understand that the government has been approached by certain NCRU groups who are expressing concerns over their inability to access land for their particular activities. We do not know what all of these recreational activities are or whether some or all of them are the types of

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[85] All of the jurisdictions in the United States with recreational use legislation require that entry to land be for some sort of recreational use, purpose or activity. The Nova Scotia legislation is the only Canadian legislation that does not contain an equivalent requirement.

[86] *Supra* note 11. The draft regulations contained in the discussion document provide a non-exhaustive list of "recreational purposes". These include: hunting within the meaning of the *Wildlife Act*; camping; fishing; boating, swimming and other water sports; berry picking, mushroom picking and picking of other fruits or herbs; picnicking; hiking; orienteering; nature study and viewing or photographing scenic sites; snow skiing, snowshoeing, skating, sledding and other winter sports; hangliding; bicycling; the use of animals for transportation and the use of motor vehicles.

recreational activities that the legislature wants to promote. If there are one or more recreational activities that can be identified as requiring increased access to lands and which are the type of activities that the legislature wants to promote, then the proposed legislation could be restricted to those activities. Otherwise, it is difficult to justify limiting the type of activities to which the legislation might apply.

[119] If the legislation is to apply to all recreational activities, it is doubtful that there is any point in trying to come up with a definition of a recreational activity. If a definition is broad enough to cover all types of recreational activities, then it does not provide any useful function in delineating the scope of the legislation. Defining recreation in broad terms is probably of no more practical use than simply referring to "recreational use" and providing no definition of the term at all. This may explain why the legislation in B.C., Ontario and PEI applies to entrants who enter premises "for the purpose of a recreational activity" without further definition.

c. *Applying the Legislation to Recreational Activities with Certain Characteristics*

[120] Many states include a list of covered activities in their recreational use legislation. Usually that list is non-exhaustive.[87] For example, for the purposes of the California statute, a recreational purpose includes:

> such activities as fishing, hunting, camping, water sports, hiking, spelunking, sport parachuting, riding, including animal riding, snowmobiling, and all other types of vehicular riding, rock collecting, sightseeing, picnicking, nature study, nature contacting, recreational gardening, gleaning, hang gliding, winter sports, and viewing or enjoying historical, archaeological, scenic, natural, or scientific sites.[88]

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[87] This is the approach that was taken in the 1965 Model Act, and which has been followed in many US jurisdictions (with the occasional slight modification in activities listed). See for example CONN. GEN. STAT. ANN. § 52-557f (West 1991); FLA. STAT. ANN. § 375.251(5) (West 1997); GA. CODE ANN. § 51-3-21 (1982); HAW. REV. STAT. § 520-2 (Supp. 1998); KAN. STAT. ANN. § 58-3202 (1994); MD. CODE ANN., [NAT. RES. I] § 5-11-6 (1998); MINN. STAT. ANN. § 604A.21 (West Supp. 1999); MISS. CODE ANN. § 89-2-3 (1999); NEB. REV. STAT. § 37.729 (1998); N.D. CENT. CODE § 53-08-01 (Supp. 1999); OKLA. STATE. ANN. Tit.76, § 10 (West 1995), OR. REV. STAT.§ 105.672 (1997); R.I. GEN. LAWS. § 32-6-2 (1994); S.C. CODE ANN. § 27-3-20 (Law. Co-Op. 1991); UTAH CODE ANN. § 57-14-2 (Supp. 1999); WYO. STAT. § 34-19-101 (1999).

[88] CAL. CIV. Code § 846 (West 1982 & Supp. 1999).

[121] Where an individual is injured while involved in one of the enumerated activities, it is clear that the reduced duty applies. However, interpretation problems arise when an individual is injured while engaged in a non-listed activity. Faced with this situation, a court may try to interpret the general words by identifying some common characteristics of the enumerated activities to compare against the activity in question or may feel forced to resort to a more general definition of recreation.[89] In either case, in the US this approach has led to a substantial amount of uncertainty in the application of the legislation to any activity which is not specifically enumerated.

[122] It should be kept in mind that the importance of a clear recreational use requirement and the approach to be taken to it will depend to some extent on the approach that is taken to other elements in the legislation. If the provision only applies to certain types of lands, then this may help a court to determine the types of activities intended to be included. If the provision applies to land in general, then it becomes more important to clearly specify and limit the activities which will be covered.

d. Applying the Legislation to Specific Recreational Activities

[123] Both Manitoba and Saskatchewan have dealt with recreational use issues only in relation to certain specified recreational activities. In Saskatchewan the liability of an occupier to snowmobilers and hunters on their premises is addressed in two separate pieces of legislation.[90] Manitoba's *OLA* contains the following provision in relation to off-road vehicles:

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[89] In *Ornelas v. Randolph*, *supra* note 33 the court looked at the list of enumerated activities set out in the California recreational use statute, *ibid.* and observed at 563-564:

> They range from risky activities enjoyed by the hardy few (eg. spelunking, sport parachuting, hang gliding) to more sedentary pursuits amenable to almost anyone (eg. rock collecting, sightseeing, picnicking). Some require a large tract of open space (eg. hunting) while others can be performed in a more limited setting (eg. recreational gardening, viewing historical, archaeological, scenic, natural and scientific sites).

In the result, the Court felt that the examples did not effectively limit the meaning of "recreational purpose".

[90] *The Snowmobile Act*, and *The Wildlife Act, 1997*, *supra* note 15. In proposals for occupier's liability legislation, the Saskatchewan Law Reform Commission recommended that these exceptions be included in an *OLA*, but that the snowmobile exception should be expanded to apply to all motor vehicles. (Saskatchewan Law Reform Commission, *Tentative Proposals for an Occupier's Liability Act* (Saskatoon: The Commission, 1980) at 52.

> 3(4) Notwithstanding subsection (1), an occupier of premises owes no duty of care towards a person who is driving or riding on an off-road vehicle or is being towed by an off-road vehicle or is riding on or in a conveyance being towed by an off-road vehicle on the premises without the express or implied consent of the occupier, except the duty
>
> (a) not to create a danger with deliberate intent of doing harm or damage to the person or the person's property; and
>
> (b) not to act with reckless disregard of the presence of the person or the person's property[91]

Ontario has a similar provision in relation to snowmobiles in their *Motorized Snow Vehicles Act*,[92] as well as the general recreational use provisions contained in their *Occupiers' Liability Act*.

[124] A specific recreational activity also provided the original impetus for the recreational use legislation in Wisconsin. Apparently, industrial forest owners who were concerned with timber damage caused by deer wanted to encourage hunters onto the premises but were concerned about their potential liability to those hunters.[93] The scope of the legislation has since been expanded.

[125] In a few states recreational use legislation applies to a number of specific recreational activities which are specifically listed.[94]

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[91] *Supra* note 15. This provision only applies to snowmobilers who are trespassing. Under the Manitoba *OLA*, trespassers are owed the common duty of care. The Manitoba Law Reform Commission did not perceive the need to extend the reduced duty in relation to snowmobiles to all recreational activities conducted on a limited group of premises. (Manitoba Law Reform Commission, *Report on Occupier'Liability*, Report #42 (Winnipeg: The Commission, 1980).

[92] R.S.O. 1990, c. M.44, s. 22:

> Every person who is driving or riding on a motorized snow vehicle or is being towed by a motorized snow vehicle on any premises shall be deemed, for the purposes of subsection 4(1) of the *Occupiers Liability Act*, to have willingly assumed all risks where,
> (a) no fee is paid for the entry or activity of the person, other than a benefit or payment received from a government or government agency or a non-profit recreation club or association; and
> (b) the person is not being provided with living accommodation by the occupier.

This legislation was apparently passed in response to the decision in *Veinot*, *supra* note 21 and the concerns expressed by occupiers regarding that decision.

[93] Dean P. Laing, "Wisconsin's Recreational Use Statute: A Critical Analysis" (1983) 66 Marq. L. Rev. 312.

[94] See for eg. IOWA CODE ANN. § 461C.2 (West 1997); LA. REV. STAT. ANN. § 9:2791 (West 1997); N.H. REV. STAT. ANN. § 212:34 (1989); N.Y. GEN. OBLIG. LAW § 9-103 (McKinney 1989).

[126] On the one hand it seems likely that such a narrow approach will lead to numerous amendments as different recreational groups come forward requesting inclusion of their activity in the legislation.[95] On the other hand, this at least means that the recreational users affected by the legislation will have made the decision to be bound by it. In addition, the application of the legislation will be clear.

e. *General Observations*

[127] Part of the problem in formulating a recreation requirement is that there is a subjective element of recreation that is not captured solely by reference to the physical activity itself.[96] People engage in recreational activities for any number of reasons ranging from physical and mental health to personal growth and spiritual enlightenment. Thus recreational legislation frequently refers to "recreational use" or "recreational purposes" in addition to or instead of listing recreational activities. A model act proposed in 1979 defined "recreational use" to mean "any activity undertaken for exercise, education, relaxation or pleasure on land owned by another"[97] and eliminated reference to specific activities altogether. However, this definition has only been adopted in a few US jurisdictions.[98]

[128] The type of problem posed by the mental element of a recreation is perhaps best illustrated by example. If an individual is injured while diving into a lake from a pier it seems clear that the injury occurred while the individual was involved in a recreational activity. However if that individual dives into the lake to rescue someone screaming for help, the mental element of recreation no longer exists.

[129] This problem has been approached in different ways in different jurisdictions in the United States. One approach is to look at the activity itself and ignore any

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[95] One possibility would be for the *OLA* to provide for a regulation-making power that would allow designation of activities.

[96] For a more detailed analysis of this problem see S. Ford, *supra* note 4.

[97] W.L. Church, *Report on Private Lands and Public Recreation: A Report and Proposed New Model Act on Access, Liability and Trespass*, 29-41 (January 1979).

[98] See for example, ILL. ANN. STAT. ch. 745, para.65/2 (Smith-Hurd 1993). Some states incorporate this definition into their list of activities eg. ARK. CODE ANN. § 18-11-302 (Michie 1997 & Supp. 1999); MO. REV. STAT. § 537.345 (Vernon 1988).

independent determination of whether the activity had a recreational purpose.[99] But some courts have tried to analyse the purpose of the activity either on an objective or subjective basis.[100] The tradeoff for being able to deal with unusual circumstances such as outlined in the previous paragraph is the increased uncertainty this creates in the application of the legislation.

[130] A related difficulty arises where an entrant's activities change character after entry to the land. Most recreational legislation in the US and Canada refers to the entrant entering the premises for "recreational purposes" "for recreational use" or "for the purpose of a recreational activity". The advantage of this approach is that it covers the situation where a plaintiff enters the premises for a recreational purpose and is injured before the activity commenced. This is consistent with the purpose of the legislation so long as the plaintiff is involved in something that is incidental to the recreational purpose (eg. walking to a river to fish). However, this phrasing does not cover the situation where an individual initially enters the land for a non-recreational purpose and then engages in a recreational activity, or where an individual crosses land in order to reach a recreational area, or where there is more than one "purpose" for the entry.[101] In addition there remains the problem of assessing when a purpose is recreational (eg. does watching a recreational user count?) and whether a court should use subjective or objective criteria to make this determination. All of these issues have been raised in litigation in the United States with varying results.

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[99] See *Schneider v. U.S.*, 760 F.2d 366 at 368 (1st Cir. 1985) where the plaintiff was injured while walking to the beach to drink a cup of coffee. The plaintiff argued that her visit did not have a recreational purpose. The court ignored any subjective element on the basis of "..the extraordinary problems that would arise if the government's liability were to depend on drawing a line between a picnic lunch and a cup of coffee (coffee and a submarine sandwich, but not coffee, and perhaps a donut)...".

[100] In *Silingo v. Village of Mukwonago*, 458 N.W.2d 379 (Ct. App. Wis. 1990) the plaintiff was injured when she stepped into a hole at a flea market. The court considered other objective factors besides the nature of the activity including the purpose of the activity and the consequence. In *Shannon* v. *Shannon*, 442 N.W.2d 25 (Wis. 1989) the court declined to apply a recreational use provision to an infant who nearly drowned in a lake. The court did not consider "the random wanderings of a three-year-old" to be a recreational activity within the meaning of the legislation.

[101] In some states the legislation specifically deals with these sorts of issues. For example, the legislation in Maine defines recreational activities to include "entry of, volunteer maintenance and improvement of, use of and passage over premises in order to pursue" the activities encompassed by the legislation. ME. REV. STAT. ANN. tit.14, § 159-A (West Supp. 1999).

[131] Some types of recreational activities have the potential to cause injury to others. Since the duties under the *OLA* apply in relation to activities on premises as well as to the condition of the premises, an occupier may be concerned about liability for injuries caused to one NCRU by another NCRU whom they have permitted on the premises. Although it is not clear that liability would flow to an occupier in these circumstances, consideration could be given to including a provision dealing with this concern in any proposed recreational use legislation. This type of provision exists in much of the recreational use legislation in the United States.[102]

f. Types of Recreation–Basic Choices

[132] We have raised many practical problems that arise in imposing a recreation requirement in any proposed legislation. However, we think it important that the types of issues we have raised be considered, not only in drafting the appropriate provision, but in considering whether or not this type of legislation should be adopted in Alberta.

[133] The broadest approach would be to include a recreation requirement in the legislation, but to either provide an all-encompassing definition of recreation or to provide no definition of the term. The latter approach is taken in most of the Canadian provinces. In either case, whether or not the activity was covered by the legislation would ultimately be in the hands of the courts. The suitability of this option will, in part, depend on what other limitations are placed on the applicability of the recreational use legislation.

[134] An intermediate approach that has been taken in Alberta in relation to the *ADSAA* as well as many jurisdictions in the United States is to try to give some guidance on the subject of recreation by providing a non-exhaustive list of typical recreational pursuits that would be covered by the legislation. This gives the courts

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[102] The 1965 Model Act contains the following provision which has been adopted in most states:

> 4. Except as specifically recognized by or provided in Section 6 of this act, an owner of land who either directly or indirectly invites or permits without charge any person to use such property for recreational purposes does not thereby:
>
> (c) Assume responsibility for or incur liability for any injury to person or property caused by an act or omission of such persons.

Supra note 17. The 1979 model legislation contains a similar provision.

some latitude to deal with difficult situations and to interpret the legislation in accordance with its objective, thus preventing illogical or inconsistent results. The tradeoff for this latitude is the uncertainty in the application of the legislation that is created as a result. The experience in some states would suggest that there is a real possibility that a court will find the list unhelpful and create their own criteria for determining what recreational activities should be covered.

[135] A narrow recreational use provision would apply only to very specific recreational activities which would be listed in the statute. In order for the reduced duty to apply to an occupier, an entrant to the premises would have to be invited or permitted onto the premises for the purpose of pursuing one of the listed activities, and would have to have entered the premises for that purpose. This approach creates the most certainty for occupiers and NCRUs in terms of when a relaxed duty will apply, and ensures that the legislation is only applied to recreational activities that the legislature wishes to promote. Aside from the frequent amendments that may be required to encompass new or increasingly popular activities, there is a danger that this type of approach will lead to inconsistent and undesirable results if an individual is injured while participating in an activity which is not listed, but which is substantially similar to a listed activity.[103]

[136] Regardless of the approach chosen, for added clarity it would be useful to indicate that the provisions applied to entry, use of, and passage over the premises in order to pursue a recreational activity. It might also be prudent to specify whether spectators and instructors of a recreational activity are included in the application of the legislation. Finally, consideration should be given to including a provision that states that an occupier is not liable for injuries to a recreational user caused by another recreational user on their land. Adding this detail would clarify the situation for occupiers who may have concerns in that regard.

[137] It is important that the decisions that are made as to the scope of the legislation be made on the basis of adequate information as to the need for

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[103] For example, in New York, there is a series of cases dealing with the issue of whether an injured plaintiff was "hiking" (an activity enumerated in their exhaustive list of activities) or "walking" (an activity that is not encompassed by the recreational use legislation). See Paul F. Clark, "Into the Wild: A Review of the Recreational Use Statute" (1998) N.Y. St. B.J. 22 and the references noted therein at 22.

recreational access and bearing in mind the far-reaching effects that such legislation can have if incorrectly applied.

[138] We recognize that no legislation is going to address every conceivable problem that will arise. On the basis of the US experience we think there is a distinct possibility that if recreational use legislation is enacted it will be applied to the detriment of injured parties in situations that were never intended to be covered.[104] From a policy perspective, the legislature might even consider this to be justified on rare occasions if the legislation otherwise achieves its objectives. This analysis would be difficult to undertake, but we would hope that if recreational use legislation is enacted that some attempt to assess the effect of the legislation would be made in the future. To this end enough information should be collected about the current access situation to allow a comparison to be made.

4. Types of NCRUs

a. Children

[139] A decision will have to be made whether the reduced duty created by recreational use legislation will apply to child NCRUs in addition to adult NCRUs. Some additional policy considerations apply to children because of the possibility that they will often be less able to perceive the dangers that exist on premises or will be less able to make reasonable choices to avoid those dangers. Concern over the vulnerability of children led to the distinction in the current *OLA* between the duty owed to adult trespassers under section12 and the duty owed to child trespassers.[105]

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[104] While many commentators on recreational use legislation recognize that there might be a valid policy reason behind it, many also note problems with its application and are critical of the potential for unfair results. See for *e.g.*"The Minnesota Recreational Use Statute: A Preliminary Analysis" (1977) 3 Wm. Mitchell L. Rev. 117 at 164; Barrett, *supra* note 4 at 28, Jim Butler, "Outdoor Sports and Torts: An Analysis of Utah's Recreational Use Act" (1988) 47 Utah L. Rev. 47 at 111; Laing, *supra* note 93 at 343; George R. Thompson & Michael H. Dettmer, "Trespassing on the Recreational User Statute" (1982) Mich. B.J. 726 at 735; Jan Lewis, "Recreational Use Statutes: Ambiguous Laws Yield Conflicting Results" (1991) Trial 68 at 72; Glen Rothstein, "Recreational Use Statutes and Private Landowner Liability: A Critical Examination of *Ornelas* v. *Randolph*" (1994) 15 Whittier L. Rev. 1123 at 1152; Christine C. Weiner, "Should Landowners Have Tort Immunity from Recreational Users?"(1988) 16 W. St. U. L. Rev. 201 at 237; Kathryn D. Horning, "The End of Innocence: The Effect of California's Recreational Use Statute on Children at Play" (1995) 32 San Diego L. Rev. 857 at 894.

[105] Child trespassers are also discussed briefly in Appendix B at 55. For ease of reference we reproduce section 13 in both places.

[140] The duty owed to child trespassers is contained in section 13 of the *OLA*.[106] The section is fairly self-explanatory. It provides as follows:

> 13(1) When an occupier knows or has reason to know
>
> (a) that a child trespasser is on his premises, and
>
> (b) that the condition of, or activities on, the premises create a danger of death or serious bodily harm to that child,
>
> the occupier owes a duty to that child to take such care as in all the circumstances of the case is reasonable to see that the child will be reasonably safe from that danger.
>
> (2) In determining whether the duty of care under subsection (1) has been discharged, consideration shall be given to
>
> (a) the age of the child,
>
> (b) the ability of the child to appreciate the danger, and
>
> (c) the burden on the occupier of eliminating the danger or protecting the child from the danger as compared to the risk of the danger to the child.
>
> (3) For the purposes of subsection (1), the occupier has reason to know that a child trespasser is on his premises if he has knowledge of facts from which a reasonable man would infer that a child is present or that the presence of a child is so probable that the occupier should conduct himself on the assumption that a child is present.

i. Reform Under the ADSAA

[141] The issue of child NCRUs is not expressly addressed by the *ADSAA* or by the draft regulations. The amendment to the *OLA* provides that the liability of the holder of an agricultural disposition to a person entering for recreational purposes "shall be determined as if the person entering the land were a trespasser."[107]

[142] Since the liability of an occupier to a trespasser under section 12 is expressly subject to section 13 dealing with child trespassers, it seems logical to assume that the effect of the amendment is to retain the current distinction between the duty owed to adult trespassers and child trespassers. However, in the absence of any discussion on this point in the Agricultural Lease Review Report, Hansard, or in the discussion document on the draft regulations, we do not know if this was the

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[106] *Supra* note 1.

[107] *ADSAA*, *supra* note 10.

intended result, and it is not entirely clear how the *ADSAA* will be interpreted on this question.

ii. Other Jurisdictions

[143] In the other Canadian provinces with occupiers' liability legislation, the abolition of the trespasser/visitor distinction also removed any need to treat child trespassers separately from adult trespassers, as both were owed the highest possible duty: the common duty of care.

[144] None of the Canadian jurisdictions which subsequently adopted recreational use provisions in their occupiers' liability legislation excepted children from the application of those provisions. Child NCRUs who enter the types of premises listed in those recreational use provisions are only owed the minimum duty of care. Since the relevant sections in the British Columbia, Ontario, Nova Scotia and PEI Acts also apply to trespassers, the duty owed to child NCRUs is the same whether or not they are on the premises with the occupiers' consent.

[145] In the United States the application of recreational use legislation to children varies from jurisdiction to jurisdiction. The recreational use legislation in the US exists as an exception to the common law of occupiers' liability. The US common law had developed the "attractive nuisance" doctrine in relation to child trespassers. This doctrine made a landowner liable for injuries to trespassing children caused by an artificial condition on the land if:

> a) the place where the condition existed was one upon which the possessor knew or had reason to know that children were likely to trespass and
>
> b) the condition was one which the possessor knew or had reason to know... would involve an unreasonable risk of death or serious bodily harm..., and
>
> c) the children because of their youth did not discover the condition or realize the risk involved..., and
>
> d) the utility to the possessor of maintaining the condition and the burden of eliminating the danger were slight as compared with the risk to children...., and
>
> e) the possessor failed to exercise reasonable care to eliminate the danger or otherwise to protect the children. [108]

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[108] American Law Institute, *Restatement (Second) of the Law of Torts 2d.* (1965) § 339.

The enactment of recreational use legislation has not had a uniform effect on this doctrine. In some states the doctrine is expressly removed[109] or retained[110] by the legislation. Where the legislation does not address the issue, some courts have ruled that its application is unchanged, while other courts consider it to have been implicitly overruled.

iii. General Observations

[146] It is an important policy question whether or not there are more compelling reasons to protect the safety of children than to promote recreational access. If part of the justification for lowering the duty owed to NCRUs is that the NCRUs are prepared to accept an increased risk of uncompensated injury in exchange for access to land for recreational use, this cannot be said of children, who are not capable of forming the intent to agree to such a tradeoff.

[147] In addition, the application of recreational use provisions to children in Alberta may have an impact upon child trespassers who are not engaged in recreational pursuits (as that term is used in the context of recreational use legislation). If the duty to both adults and children NCRUs is lowered to a duty equivalent to that owed to child trespassers, or higher, then the child trespasser provision could be left as is. However, if the relaxed duty that is chosen is the duty currently owed to adult trespassers, and if no exception is made in recreational use legislation for child NCRUs, this could have serious repercussions for the current law in relation to child trespassers. It would be difficult to justify applying a lower duty of care to a child recreational user invited or permitted to be on the premises than to a child trespasser. Therefore if child recreational users were to be subject to a lower duty than set out in section 13 in certain circumstances, the child trespasser provisions would have to be repealed in those circumstances as well. The result would be a change in the duty owed to child trespassers without any corresponding benefit. How great an effect this change would have on child trespassers would depend on the scope of the application of the recreational use legislation, with the

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[109] For example recreational use legislation is applied to "any individual, regardless of age, maturity, or experience" in Alabama (ALA. CODE § 35-15-24 (1991)), Colorado (121 COLO. REV. STAT. ANN. § 33-41-104 (1999)) and Illinois (ILL. ANN. STAT. ch. 745, para. 65/6 (Smith-Hurd 1993)).

[110] In Indiana the legislation is stated not to affect Indiana case law on the liability of owners or possessors of premises with respect to the attractive nuisance doctrine. IND. CODE ANN. § 14-22-10-2 (Burns Supp. 1999).

potential to eliminate the child trespasser distinction altogether.[111] Such a decision should not be taken lightly.

[148] The argument against an exception for child recreational users is that this would defeat the objective of the legislation to encourage access. If an occupier owes a duty to child recreational users that is higher than that owed to an adult recreational user, this decreases the overall benefit to occupiers under the legislation and reduces the incentive to allow access. It would be impossible and undesirable for an occupier to try to monitor visitors to the premises in order to exclude children. Even applying the section 13 duty to child recreational users would have the potential to reduce, if not eliminate altogether any increase in access that might otherwise result from the legislation. In addition, many adult NCRUs no doubt want their children with them when they engage in recreation and consider that they can adequately protect them from any dangers.

[149] We indicated previously that the amendment to the *OLA* under the *ADSAA* appears to apply the section 13 duty to child recreational users, though this is not entirely clear. We should note that in that particular case incentive to allow access is not a consideration because the accompanying amendment *requires* the occupiers who are affected to allow reasonable access for recreational purposes.

iv. Child NCRUs–Basic Choices

[150] The two basic options are either to create some sort of an exception for child NCRUs or to treat them the same as adult NCRUs. The scope of the reform will be narrower if some sort of an exception is to be made for children. There are three possible scenarios under the first option:

1) Child NCRUs could be owed the common duty of care;
2) Child NCRUs could be owed the duty of care currently owed to child trespassers
3) Child NCRUs could be owed some other duty in the range between the adult trespasser duty and the common duty of care.

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[111] For a detailed discussion of the impact of recreational use legislation on children in California see Horning, *supra* note 104.

[151] For the reasons stated above, the first scenario is the most likely to negative any incentive for occupiers to open their premises to NCRUs generally. This would significantly narrow the scope of the reform. Choosing either of the other two scenarios would have less impact on any potential access increase, but is still likely to have some impact. This is the intermediate approach.

[152] The other basic option is to treat child NCRUs under the legislation the same way that adult NCRUs are treated.[112] Both child and adult NCRUs could be owed some intermediate duty of care (ie. between the liability owed to a trespasser and the common duty of care). Alternatively, an occupier's liability to all NCRUs could be limited to damages for death or injury resulting from wilful or reckless conduct which would leave occupiers under a higher duty to child trespassers than to child NCRUs unless something further is done. The broadest scope of reform would be achieved by choosing the latter alternative.

b. Social Guests

[153] Social guests are a category of entrants that have historically received special status under occupiers' liability law. Whether recreational use provisions should apply to NCRUs who are specifically invited rather than merely permitted onto premises is another issue that merits some consideration.

i. Reform Under the ADSAA

[154] The amendment to the *OLA* applies to person who enter and use an agricultural disposition under section 59.1 of the *Public Lands Act*. Section 59.1 requires a disposition holder to allow reasonable access, in accordance with the regulations, to persons who wish to use the land for recreational purposes. The draft regulations require persons wishing to gain access to the disposition to contact the disposition holder (or their contact person) and to provide certain information, including the number of persons who wish to gain access, the recreational purpose for which access is desired and the location at which the recreational purpose will be carried out.[113]

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[112] The issue of what the reduced duty to adult NCRUs might be is discussed at 70-77, below.

[113] *Discussion Document*, *supra* note 11 at 12-13.

[155] Since a social guest invited to the premises by a disposition holder for recreational purposes will not have entered the disposition under section 59.1, presumably the reduced duty would not apply to them. In this way, the *ADSAA* amendments appear to draw a distinction between recreational users who are invited to the premises and those who are merely permitted in accordance with section 59.1 of the *Public Lands Act*. There is no discussion on this point in the Agricultural Lease Review Report, or in the draft regulations.

ii. Other Jurisdictions

[156] There is no exclusion for social guests who enter premises for the purposes of recreation in the British Columbia, Ontario or P.E.I. legislation.[114] In Nova Scotia, an exception to the application of the relaxed duty is created for a person who enters premises for a purpose connected with the occupier or any person usually entitled to be on the premises.[115] This might be seen as including a social guest invited to the premises in some circumstances, although at the time of writing there are no cases on this point.

[157] In the United States, the issue of whether or not social guests engaged in recreational activities should be subject to the limited liability of recreational use legislation is a matter of some debate. Some jurisdictions specifically exclude recreational users who are expressly invited to premises from the application of their recreational use statutes.[116] In Hawaii an exclusion is made for "house guests" who are defined as "...any person specifically invited by the owner or a member of the owner's household to visit at the owner's home whether for dinner, or to a party, for conversation or any other similar purposes including for recreation, and includes playmates of the owner's minor children".[117] Even in jurisdictions where

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[114] The British Columbia Law Reform Commission recommended that the recreational use provision not apply to a person invited to the premises rather than permitted. The recommended provision was not adopted, *supra* note 48 at 64. The Saskatchewan Law Reform Commission also recommended that their proposed recreational use provision not apply to social guests. Saskatchewan Law Reform Commission, *supra* note 90.

[115] *OLA*, *supra* note 15, s. 6(3)(a).

[116] Eg. IND. CODE ANN. § 14-22-10-2(f)(1)(b) (Burns Supp. 1999); CAL. CIV. CODE § 846 (West 1982).

[117] HAW. REV. STAT. § 520-2 (Supp. 1998).

no specific exception is made, some courts have refused to apply the legislation to social guests.[118]

[158] The Irish Law Reform Commission struggled with the issue of invited guests in considering recreational use provisions in their occupiers' liability legislation. One Commissioner commented: "It is accepted by all that the paying guest should be owed (the ordinary) duty of care: it would be a sad reflection on modern priorities that a guest invited out of friendship, or familial affection should be owed a lesser duty".[119]

iii. Social Guests–Basic Choices

[159] The basic choice is between creating an exception for social guest NCRUs in the proposed legislation or treating them the same as other NCRUs. It will be difficult in practice to draw a distinction between NCRUs who are specifically invited and those who are merely permitted. In addition, removing invited guests from the application of recreational use legislation creates an exception to the exception from the common duty of care, and further complicates the *OLA* by creating yet another category of entrant to be considered. So, one option is to treat social guests like other NCRUs.

[160] On the other hand, treating social guest NCRUs like other NCRUs is not necessarily consistent with the intent of the legislation to increase public access to lands for recreational use. Social guests likely would have had the use of the land for recreational purposes regardless of the legislation. Even if that is not the case, it is easier for an occupier to make premises safe for specifically invited guests. Furthermore guests who are specifically invited to premises may have a reasonable expectation that the premises will be safe for them.

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[118] Eg. *Herring* v. *Hauck*, 165 S.E.2d 198 at 199 (GA, 1968): recreational use legislation not meant to apply " to the friendly neighbour who permits his friends and neighbours to use his [premises] without charge"; *LePoidevin* v. *Wilson*, 330 N.W.2d 555 at 563 (Wis. 1983): "Granting the protection... to a landowner who invites a friend of the family to the summer cottage as a guest to join the family...does not foster the purpose of sec 29.68 to encourage landowners to make land and water areas available to the public for recreational use."

[119] Ireland Law Reform Commission, *Report on Occupiers' Liability* (Dublin: The Commission, 1994) at 15. An exception for social guests was not recommended however, as other Commissioners felt that the difficulty in drawing a distinction between personally invited guests and guests who were simply permitted to be on the premises was insurmountable.

[161] If an exception is to be created for social guest NCRUs, it will be necessary to consider whether they should be subject to the common duty of care, or some modified duty. The former approach is the narrow approach. Applying some modified duty is an intermediate approach.

5. Compensated Use

[162] In the course of this report we refer to "non-commercial" recreational users. Our understanding is that the proposed change to the *OLA* is not intended to apply to occupiers of premises who open those premises for recreational use on a commercial basis. There are two basic reasons for excluding the application of recreational use legislation to such occupiers. First of all, it is presumed that occupiers who allow access to premises for recreational purposes on a commercial basis are motivated to do so by their own financial self interest, and that there is no need to offer a further incentive by way of a liability reduction. Secondly, the purpose of recreational use legislation is to increase recreational access to land for the general public, not merely those members of the public who can afford to pay an entry fee.

[163] All recreational use legislation in Canada and the United States contains some sort of an exclusion in relation to occupiers who obtain an economic benefit in exchange for access.[120] This section of the report discusses some of the different approaches that have been taken in these exclusionary provisions and sets out some of the issues that have arisen in their creation and interpretation.

a. Reform Under the ADSAA

[164] The amendments under the *ADSAA* do not specifically deal with the question of compensation. Since the amendments require disposition holders to allow reasonable access, the legislation appears to contemplate that the access is without charge. The draft regulations suggest that certain disposition holders may impose reasonable terms and conditions in respect of use and access. We are assuming that charging an entrance fee would not qualify as a reasonable term or condition however, how this will be interpreted remains to be seen.

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[120] For ease of reference we will refer to these on occasion as "compensated use exclusions".

b. Other Jurisdictions

[165] In Canada, the approach taken to the compensation issue has been fairly uniform. The British Columbia legislation applies only where the person entering the premises does so for the purpose of a recreational activity and "the occupier receives no payment or other consideration for the entry or activity of the recreational user, other than a payment or other consideration from a government or government agency or a non-profit recreational club or association.[121] The wording of the Ontario, P.E.I. and Nova Scotia legislation is only slightly different.[122]

[166] In the US, several states have adopted the provision contained in the 1965 Model Act which excludes the liability limitation where the owner of land *charges* entrants for recreational access to the land. The term "charge" is defined in the Act to mean "..the admission price or fee asked in return for invitation or permission to enter or go upon the land."[123] In some states, the term "consideration" or "valuable consideration" is used instead of charge.[124] In others, the recreational use provisions do not apply to "commercial" recreational use or activities.[125] Some states have adopted completely different approaches to the compensated use exclusion which approaches are discussed in more detail below.

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[121] B.C. *OLA*, *supra* note 15 s. 3(3.2)(b).

[122] The legislation in Ontario and P.E.I. applies the lower duty of care where a person enters certain premises for the purpose of a recreational activity and "no fee is paid for the entry or activity of the person, other than a benefit or payment received from a government or government agency or a non-profit recreation club or association..." Ontario *OLA*, *supra* note 15 s. 4(3); P.E.I. *OLA*, *supra* note 15 s. 4(3). In Nova Scotia the limited liability does not apply to a person who "has paid a fee for the entry or activity of the person on premises, other than a benefit or payment received by the occupier of the premises from a government or government agency or a non-profit recreation club or association.." N.S. *OLA*, *supra* note 15 s. 6(3)(b).

[123] 1965 Model Act, *supra* note 17, s. 2(d).

[124] Eg. ARIZ. REV. STAT. ANN. § 33-1551(Supp. 1999), ME. REV. STAT. ANN. tit. 14, § 7-159A (West Supp. 1999); MICH. COMP. LAWS ANN. § 324.73301 (West 1999); MONT. CODE. ANN. § 70-16-302 1999); N.H. REV. STAT. ANN. § 212:34 (1989); N.M. STAT. ANN. § 17-4-7 (Michie 1995); NEV. REV. STAT. § 41.510 (Michie 1997); N.Y. GEN. OBLIG. 9-103; OHIO REV. CODE ANN. § 1533.18 (Anderson 1997).

[125] Eg. ALA. CODE § 35-15-23 (1991); FLA. STAT. ANN. § 375.251 (West 1997); LA. REV. STAT. ANN. § 9:2791 (West 1997); VT. STAT. ANN. tit. 12 § 5792 (1997).

i. Direct Benefits

(a) Monetary

[167] The majority of recreational use statutes preclude application of the limited liability provisions to an occupier who receives a monetary payment in exchange for access. The only exception that is generally made is in relation to payments received from the government.[126] The Canadian statutes also exclude payments received from a non-profit recreational club or association.[127]

[168] The wholesale exclusion of occupiers who receive any direct monetary compensation has been criticized on the grounds that occupiers who open their premises to the public risk losses from deliberate or careless damage and should be compensated for that risk and any inconvenience that allowing access to the premises may cause.[128] Under the majority of recreational use legislation if a landowner has incurred costs in making the land available to the public, any attempt to recover those costs would result in the forfeiture of the right to claim the reduced duty. To address these concerns, the Arkansas recreational use statute provides that the term "charge" does not include "contributions in...cash paid to reduce or offset costs and eliminate losses from recreational use".[129] Arkansas appears to be the only state that has chosen this particular approach to the issue. A few other states specifically allow occupiers to receive money directly in exchange for access and place limitations on the amount that the occupier can receive.[130]

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[126] Eg. B.C. *OLA*, *supra* note 15 s. 3(3.2)(b)(i) ; Ont. *OLA*, *supra* note 15 s. 4(3)(c)(i). In the U.S. the exception is generally limited to compensation received for lands leased to the state for recreational purposes.

[127] B.C. *OLA*, *ibid.*; Ont. *OLA*, *ibid.*; P.E.I. *OLA*, *supra* note 15, s. 4(3)(c)(i); N.S. *OLA*, *supra* note 15 s. 6(3)(b).

[128] W. Church, *supra* note 97 at 13.

[129] ARK. CODE ANN. § 18-11-302(4) (Michie 1997 & Supp. 1999).

[130] For example, in Texas, the limited liability applies both to an occupier who does not charge for entry to premises and to an occupier who charges "...but whose total charges collected in the previous calendar year for all recreational use of the entire premises...are not more than twice the total amount of ad valorem taxes imposed on the premises for the previous calendar year." TEX. CIV. PRAC. & REM. CODE ANN. § 75.003(c) (West Supp. 2000). In Wisconsin, a private property owner can collect money, goods or services in payment for the use of their property for the recreational activity during which the injury occurs if the aggregate value of all payments received by the owner for the use of the owner's property for recreational activities during the year does not exceed $2,000. Payment does not include a donation of money made for the management and conservation of the resources on the property, a payment of not more than $5 per person per day for permission to gather any product

(continued...)

[169] There is some logic to the suggestion that landowners should be allowed to charge for entry so long as those charges are used to assist in making the premises accessible for recreational use, to maintain the premises for recreational users, or to compensate the landowner for damage done to the property by recreational users. In these circumstances the money does not represent a profit to the landowner. This suggestion also takes into account the fact that liability concerns are not the only reason that landowners could have for prohibiting recreational use. However, there are practical problems in implementation.

[170] The advantage of simply excluding occupiers who receive any amount of money in exchange for access is that this exclusion is clear and easy to apply. Adding qualifications makes it less certain whether or not an occupier will ultimately be able to rely on the relaxed duty granted by the legislation. Even imposing a limit on the total amount that can be received in a given period of time, or for any particular visit may prevent an occupier from using a summary procedure to deal with a claim against them because the issue may not be easily determined.

(b) Non-monetary Benefits

[171] Another issue that arises is whether the compensated use exclusion should be limited to direct monetary consideration or whether the receipt of non-monetary consideration in exchange for access should also preclude an occupier from relying on the legislation. A few states specifically limit the exclusion to money.[131] However, much of the US legislation uses terms such as "consideration" which are open to the interpretation that non-monetary payments will suffice. Three of the

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[130] (...continued)
of nature, a payment received from a governmental body, or a payment received from a nonprofit organization for a recreational agreement: WIS. STAT. ANN. § 895.52(6)(a) (West Supp. 1999). In West Virginia a one-time fee for a particular occasion or a charge that does not exceed $50 a year per participant is not considered a "charge": W. VA. CODE. § 19-25-5(1) (1997).

[131] In Tennessee, North Dakota and Nebraska "charge" is defined to mean "the amount of *money* asked in return for an invitation to enter or go upon land" (emphasis added). The Indiana legislation refers to the payment of "monetary compensation".

Canadian recreational use provisions apply where no "fee" is paid or received.[132] The BC legislation uses the phrase "payment or other consideration".[133]

[172] There is no obvious reason to draw distinctions between payments of money and other types of payments, particularly where even nominal amounts of money are sufficient to trigger the compensated use exclusion. However, some jurisdictions have made an exception for "the sharing of game, fish or other products of recreational use"[134] and at least one state specifically excludes "non-monetary gifts less than one hundred dollars in value".[135] Where legislation allows cash payments for the purpose of conserving land, services and contributions in kind for the same purpose may also be allowed.

[173] Non-monetary benefits may accrue directly to an occupier incidentally as a result of recreational use, such as hunting to control animal populations. Thus, in some jurisdictions in the US consideration is defined to exclude benefits arising from the recreational use.[136]

ii. Indirect Benefits

[174] Economic benefits may accrue to an occupier who does not ask for or receive consideration directly in exchange for recreational access. A very basic example is where an occupier charges for parking on the premises on a per car basis, but does not charge every occupant of the car or those who come on foot. Or an occupier might offer products, services or entertainment to NCRUs while they are on the

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[132] Ont. *OLA*, *supra* note 15 s. 4(3); P.E.I. *OLA supra* note 15 s. 4(3); N.S. *OLA supra* 6(3)(b). The N.S. Act does not apply to a person who has paid a *fee* for their entry or activity, "other than a *benefit* or *payment* received by the occupier from a government or government agency or non-profit recreation club or association (emphasis added).

[133] B.C. *OLA*, *supra* note 15 s. 3(3.2)(b)(i).

[134] The 1979 Model Act proposed this exclusion. The proposed legislation provided that : "'Charge' means an admission fee for permission to go upon the land, but does not include the sharing of game, fish or other products of recreational use; or benefits to (or arising from) the recreational use; or contributions in kind, services or cash made to the sound conservation of the land; or amounts paid as fees, rents, purchase money or otherwise by or received by any governmental agency; or sums paid by private individuals or associations where the aggregate of such sums for comparable purposes does not exceed (insert amount) per calendar year." Church, *supra* note 97 s. 2(4).

[135] South Dakota: S.D. CODIFIED LAWS ANN. § 20-9-12 (1995).

[136] ILL. ANN. STAT. ch. 745, para. § 65/2 (d) (Smith-Hurd 1993).

premises. These benefits may or may not be the real incentive behind the granting of access to the public. However, the concern that occupiers should not gain an economic benefit as well as the limited liability offered by recreational use legislation raises the question of whether these indirect benefits should also preclude application of the relaxed duty.

[175] In a few jurisdictions in the United States, the courts have refused to apply recreational use legislation where the occupier received certain indirect economic benefits.[137] Case law in this area is heavily dependent on the exact wording of the recreational use statute being considered.[138]

[176] Some states have tried to address the issue of indirect benefits with more precision. For example, in Maryland, "charge" is defined to mean "any admission price asked or charged for services, entertainment, recreational use or other activity or the offering of products for sale by a commercial for profit enterprise directly related to the use of the land".[139] In Mississippi the recreational use statute does not apply if any concession is operated on premises offering to sell or selling any item or product to persons entering the premises for recreational purposes.[140]

[177] A related difficulty is how to treat economic benefits generated on a different area of the premises than where the recreational activity is taking place. An occupier might grant access to one part of premises in the hope that NCRUs will

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[137] In *Copeland* v. *Larson*, 1124 N.W.2d 745 (Wis. 1970), the court held that the expectation of increased sales to a general store on the premises was sufficient to invoke the compensated use exception to the recreational use statute, even though the plaintiff did not actually purchase anything on the day that the accident occurred. The Wisconsin legislation was subsequently amended to overrule this decision. However, indirect pecuniary benefits are still considered by the courts in Wisconsin as sufficient to preclude the legislation's application: *Douglas* v. *Dewey*, 453 N.W.2d 500 (Wis. Ct. App. 1990). *Copeland*, *ibid.*, was applied in West Virginia in *Kesner* v. *Trenton*, 216 S.E.2d 880 (W. Va. 1975) and see *Cox* v. *U.S.*, 827 F. Supp 378 (N.D. W. Va. 1992).

[138] Where the exclusion clause is specifically limited to admission prices or fees asked in return for permission to enter the premises, even admission prices or fees paid by other guests may not be sufficient to trigger the exclusion. However, courts in jurisdictions with a broader exclusion clause have taken a correspondingly broader approach. For a further discussion on the approaches taken in different states to these two basic types of compensated use exclusions see *Twohig* v. *U.S.*, 711 F. SUPP. 560 (D. Mont. 1989).

[139] MD. CODE ANN., [NAT. RES. I] § 5-1101 (1998).

[140] MISS. CODE ANN. § 89-2-7 (1999).

pay an entrance fee to another part of the land offering some particular recreational opportunity or activity.[141] Owners of commercial operations might grant access to NCRUs to premises adjacent to those operations in the expectation of increased business. One approach that has been taken in the US has been to disallow the application of the statute where entry to property is an integral part of a commercial enterprise. Thus in Florida the recreational use legislation does not apply if any commercial or other activity whereby profit is derived from the patronage of the general public is conducted on the premises or any part of the premises.[142] In Minnesota, the commercial for-profit enterprise has to be directly related to the use of the land in order for the exclusion to apply.[143]

[178] An even more remote benefit might accrue to an occupier who offers premises to the public as a means of advertising or generating goodwill. Several courts have refused to extend the compensated use exclusion to this sort of benefit.[144] In other jurisdictions the recreational use legislation specifically addresses this point.[145]

c. Compensated Use–Basic Choices

[179] Recreational use legislation is clearly not intended to apply to occupiers whose motivation for allowing access to premises is financial gain. Therefore the choice to made is the scope of the compensated use exclusion to be included in any amending legislation.

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[141] In *Zackhery v. Crystal Cave*, 571 A.2d 464 (Pa. Super. Ct. 1990) the plaintiff was injured in a playground which was located on the same premises as a natural underground cave. There was no fee for using the playground, although an admission fee was charged for the cave. The court held that the fact the plaintiff would have been charged a fee to enter the nearby cave did not change the fact that the access to the playground was free. The defendant was entitled to rely on the recreational use legislation.

[142] FLA. STAT. ANN § 375.251 (West 1997).

[143] MINN. STAT. ANN. § 604 A. 21 (West Supp. 1999).

[144] See for eg. *Bourn v. Herring*, 166 S.E.2d 89 (Ga, 1969); *Ravell* v. *U.S., supra* note 61.

[145] Eg. ALA. CODE § 35-15-21 (1991): consideration does not include any benefits in the form of good will for permitting recreational use; MO. ANN. STAT. § 537.345(1) (Vernon 1988) the meaning of "charge" includes "an invitation or permission without price or fee to use land for recreational purposes when such invitation or permission is given for the purpose of sales promotion, advertising or public goodwill in fostering business purposes."

[180] One possibility would be to exclude the application of recreational use legislation whenever an occupier received any type of financial benefit in exchange for, or as a result of, access to the premises for recreational purposes. The compensated use exclusion would be very broad, and would have to address everything from non-monetary consideration received in exchange for access to the granting of access for the purposes of sales, promotion, advertising or goodwill. The result of a such a wide exclusion would be to narrow the application of the recreational use provision.

[181] As noted above, such a widely cast exclusion does not recognize that a landowner may suffer loss as a result of granting access, or incur some expense in granting access and that allowing recovery of that loss or expense is not contrary to the intent of recreational use legislation.

[182] Creating a narrow compensated use exclusion increases certainty, but also increases the likelihood of arbitrary results. If the exclusion is limited to payments of money made in exchange for access, this does not prevent occupiers from gaining other equally valuable economic benefits.

[183] The intermediate approach is to recognize that some types of compensation violate the intention of the legislation, while others do not. Jurisdictions that take this approach seem to focus on whether the occupier is making a profit in exchange for granting access, or whether the benefits they are receiving are simply a means of enabling the occupier to facilitate access or to maintain the property for recreational activities (eg. the cost of providing and maintaining a parking area). The main concern here is certainty. The greater the uncertainty of the application of the legislation, the less likely an occupier will be prepared to grant access in reliance upon it.

8. Level of Liability

[184] The *OLA* does not distinguish between entrants to premises who are engaged in recreational pursuits and entrants who are not. Consequently the duty owed to an NCRU currently depends on whether the NCRU is a visitor or a trespasser. If the

NCRU is lawfully on the premises, the common duty of care applies.[146] If the NCRU is not lawfully on the premises, then the liability of the occupier depends on whether the NCRU is a child or an adult. An occupier is only liable to an adult trespasser for damages for death or injury resulting from the occupier's wilful or reckless conduct.[147] The liability of an occupier to a child trespasser is set out in section 13 of the *OLA*.[148]

[185] The proposed amending legislation would reduce the liability of an occupier to a NCRU who is lawfully on their premises from the common duty of care. The reduced liability could be formulated in any number of ways, but there is a definite range within which it must fit. The duty will have to be a lower duty than the current common duty of care, but cannot be lower than the occupier's liability to a trespasser for injury caused by wilful or reckless conduct.[149]

a. Reform Under the ADSAA

[186] The *ADSAA* reduces the duty owed by agricultural disposition holders to permitted recreational entrants by adding the following section to the *OLA*:

> 11.1 The liability of a holder of an agricultural disposition issued under the *Public Lands Act* in respect of a person who, under section 59.1 of the *Public Lands Act* and the applicable regulations, enters and uses

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[146] *OLA*, *supra* note 1 s. 5. For ease of reference we reproduce the section below:
> An occupier of premises owes a duty to every visitor on his premises to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there or is permitted by law to be there.

[147] *Ibid.*, s. 12. We note that the common law approach towards trespassers has been considered inappropriate by many courts including the Supreme Court of Canada. However, we do not intend to canvass in this report whether the trespasser duty is generally appropriate, only whether it might represent an appropriate balance between NCRUs and occupiers.

[148] For a further discussion of the duty owed to child NCRUs see section 4 above at 55.

[149] In Idaho and Ohio, the recreational use legislation on its face appears to exclude any liability whatsoever in relation to injuries sustained to recreational users on premises. However, the Supreme Court of Idaho has ruled that the Idaho statute does not preclude liability of an owner for wilful or wanton conduct (*Jacobsen v. City of Rathdrum*, 766 P.2d 736, 739-40 (Idaho 1988).) The courts in Ohio have concluded that since the statute expressly provides that there is no duty owed by an occupier to a recreational user, there can be no breach of duty and therefore no liability even for wanton or wilful misconduct: *Fetherolf* v. *Ohio (Dept. of Natural Resources)*, 454 N.E.2d 564 (Ohio Ct. App. 1982); *Phillips* v. *Ohio (Dept. Of Natural Resources)*, 498 N.E.2d 230. We rejected the complete exclusion of liability as an option.

> the land that is subject to the agricultural disposition shall be determined as if the person entering the land were a trespasser.[150]

[187] Presumably if the NCRU is an adult, the liability of an agricultural disposition holder is limited to damages for death or injury resulting from their wilful or reckless conduct. As noted above, we are assuming that this provision leaves the current duty owed to a child trespasser under section 13 intact.[151]

b. Other Jurisdictions

[188] The majority of the jurisdictions that have adopted recreational use provisions have chosen to reduce the duty owed by an occupier to an NCRU to the same level of duty that was traditionally owed to a trespasser at common law. How this result has been achieved is different in Canada than in the US, and within the US differs slightly from state to state.

i. Canada

[189] In all of the Canadian jurisdictions which have included general recreational use provisions in their occupiers' liability legislation, NCRUs are deemed to have willingly accepted all of the risks of entering certain premises.[152] A separate provision in the legislation provides that an occupier has no duty of care to a person in respect of risks willingly assumed by that person other than a duty not to create a danger with intent to do harm to that person and a duty not to act with reckless disregard for their safety.[153]

ii. The United States

[190] The 1965 Model Act proposed the adoption of a duty in relation to NCRUs akin to that owed to a trespasser at common law. The Act removed any existing duty to NCRUs invited or permitted onto premises, but did not limit any liability

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[150] *Supra* note 11.

[151] See text accompanying note 106.

[152] B.C. *OLA*, *supra* note 15, s. 3(3.2)(b); Ont. *OLA*, *supra* note 15, s. 4(3)(c); P.E.I. *OLA*, *supra* note 15, s. 4(3)(c); N.S. *OLA*, *supra* note 15, s. 6(2).

[153] *Ibid.* B.C. s. 3(3); Ont. s. 4(1); P.E.I. s. 4(1); N.S. s. 5(1).

which otherwise existed "(f)or willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity."[154]

[191] Many states have simply incorporated this exact wording into their recreational use statutes.[155] Others have revised the wording only slightly, adding to or replacing "willful or malicious" with terms like "grossly negligent", "deliberate", "wanton", "reckless"and "illegal".[156]

[192] In a few jurisdictions in the US, the duty owed to recreational users is dealt with by reference to some of the specific elements which are required in order for liability to ensue.[157] For example, in Alabama, an occupier is liable to a recreational user when that occupier has actual knowledge that:

1) the outdoor recreational land is being used for non-commercial recreational purposes;
2) a condition, use, structure, or activity exists which involves an unreasonable risk of death or serious bodily harm;
3) the condition, use, structure or activity is not apparent to the person or persons using the outdoor recreational land; and
4) that having this knowledge, the owner chooses not to guard or warn, in disregard of the possible consequences.

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[154] 1965 Model Act s. 6(a).

[155] CAL. CIV. CODE § 846 (West 1982); CONN. GEN. STAT. ANN. § 52-557h (West 1991); DEL. CODE ANN. tit.7, § 5906 (1991); GA. CODE ANN. § 51-3-25 (1982); IOWA CODE ANN. § 461C.6 (West 1997); KAN. STAT. ANN. § 58-3206 (1994); KY. REV. STAT. ANN. § 411.190 (Michie Supp. 1998); ME. REV. STAT. ANN. tit 14, § 7-159A.4 (West Supp. 1999); MD. CODE ANN., [NAT. RES. I] § 5-1106 (1998); MISS. CODE ANN. § 89-2-27 (1999); NEB. REV. STAT. § 37.734 (1998); NEV. REV. STAT. ANN § 41.510 (Michie 1997); N.H. REV. STAT. ANN § 212:34 (1989); N.J. STAT. ANN. § 2A-42A-7 (West 1987); N.Y. GEN. OBLIG. LAW § 9-103 (McKinney 1989); N.D. CENT. CODE § 53-08-01 (Supp. 1999); OKLA. STAT. ANN. tit.76, § 14 (West 1995); PA. CONS. STAT. ANN. tit. 68 § 477-6 (1993); UTAH CODE ANN. § 57-14-6 (Supp. 1999); WYO. STAT. § 34-19-105 (1999).

[156] ARIZ. REV. STAT. ANN. § 33-1551.A (Supp. 1999); FLA. STAT. ANN § 375.251(4) (West 1997); ILL. ANN. STAT. ch. 745, para. 65/6 (Smith-Hurd 1993); IND. CODE ANN. § 14-22-10-2.5(d) (Burns Sup 1999); LA. REV. STAT. ANN. § 9:2791 (West 1997); MASS. ANN. LAWS ch. 21, § 17C (Coop 1996); MICH. COMP. LAWS § 324-73301(2) (West 1999); MONT. CODE ANN. § 70-16-302 (1999); OR. REV. STAT.§ 105.682 (1997); S.C. CODE ANN. § 27-3-60 (Law. Co-op. 1991); S.D. CODIFIED LAWS ANN. § 20-9-16(1995);TEX. CIV. PRAC.& REM. CODE ANN. § 75.002 (West Supp. 2000); VA. CODE ANN. § 29.1-509 (Michie 1997).

[157] 121 COLO. REV. STAT. ANN. § 33-41-104 (1999); HAW. REV. STAT. § 520-5 (1993); MO. ANN. STAT. § 537.348 (Vernon 1988); R.I. GEN. LAWS § 32-6-5 (1994); WASH. REV. CODE ANN. § 4.24.210(3) (West Supp. 2000); WIS. STAT. ANN. § 895.52 (West Supp. 1999).

The statute specifically excludes constructive knowledge from this test and also specifically provides that the legislation does not create any duty to inspect the land.[158]

c. *Liability Reduction–Basic Choices*

[193] The basic decision is whether to apply the same liability regime to NCRUs as is currently applied to trespassers in Alberta, or whether to create some sort of intermediate duty lying somewhere on the continuum between the trespasser approach and the common duty of care. This is a policy decision for the legislature which involves weighing the importance of the objective of increasing access as against the possible consequences that liability reduction may have on NCRUs.

i. The Trespasser Approach

[194] If liability concerns are limiting access to land for recreational use and if reducing the risk of liability will increase access, then the greater the reduction in liability, the greater the possibility that an increase in access will result. The maximum reduction in liability that can be made is a reduction to the level of liability that was traditionally imposed in respect of a trespasser. This approach creates the most optimal environment for occupiers who would otherwise be prepared to invite or permit recreational users onto their land.

[195] Equating the liability of an occupier to an NCRU with the liability of an occupier to a trespasser would also address the concerns of those occupiers who know of recreational use taking place on their premises, but who are unable to prevent such use. It would eliminate the risk that failure to take active steps to exclude NCRUs would lead to a finding of implied consent and the imposition of a common duty of care.

[196] We should point out that even from an occupier's perspective there may be a downside to this option. There is a possibility that this may encourage trespassing because there is no incentive for recreational users to ask for permission to enter premises. We emphasize that recreational use legislation does not grant recreational users the right to enter land over the objection of the landowner or create a presumption that land is available for recreational use simply because an occupier

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[158] ALA. CODE § 35-15-24 (1991).

does not have signage posted to the contrary. If there are concerns that landowners may have difficulty keeping trespassers off of premises, this will have to be addressed by other legislation, perhaps by way of amendment to the *Petty Trespass Act*[159] and *Trespass to Premises Act*[160].

[197] If it is decided the maximum liability reduction should be made in relation to NCRUs, there is still the question of how this is to be done. One possibility is the approach taken under the *ADSAA*, that the determination of an occupier's liability to an NCRUs is to be made as if they were a trespasser. A second possibility is to directly apply section 12 of the current *OLA* to NCRUs, or to use the same wording in a separate recreational use provision. A third possibility would be to follow the approach in other provinces of deeming NCRUs to have assumed all risks of entering premises. In all cases an occupier would only be liable to a NCRU for damages for injury or death resulting from the occupier's "wilful or reckless conduct".

[198] Courts in Alberta have had some experience in applying section 12, although there are no reported cases which consider the section in any great detail. Section 12 was intended to codify occupier's liability law in relation to trespassers at the time the *OLA* was enacted.[161] The phrase "wilful or reckless conduct" is not capable of precise definition and it is unclear exactly what level of intent and degree of knowledge is required for such conduct to be found. The term "reckless" has been defined in a number of ways, ranging from conduct akin to intentional wrongdoing to a very high degree of negligence.[162] Application of this standard may become even more difficult in the context of an attempted summary disposition of a plaintiff's claim under a recreational use provision.

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[159] R.S.A. 1980, c. P-6.

[160] S.A. 1997, c. T-8.5.

[161] The liability of an occupier to a trespasser at common law is discussed in more detail in Appendix B, below at 98.

[162] *Slaferek* v. *T.C.G. International Inc. et al.*, *supra* note 28.

ii. An Intermediate Approach

[199] The second option if it is decided to reduce the duty owed by occupiers to lawful NCRUs, is to reduce the duty to some intermediate point between the liability to a trespasser and the common duty of care.

[200] The British *Occupiers' Liability Act of 1984* adopted an intermediate standard of care in relation to trespassers. The *Act* imposes a duty to take such care as is reasonable in all the circumstances of the case to see that a trespasser does not suffer injury on premises by reason of a particular danger on the premises. This duty applies if:

a) the occupier is aware of the danger or has reasonable grounds to believe that it exists
b) the occupier knows or has reasonable grounds to believe that the trespasser is in the vicinity of the danger concerned or that he may come into the vicinity of the danger; and
c) the risk is one against which, in all the circumstances of the case, the occupier may reasonably be expected to offer some protection.[163]

[201] This level of duty bears some resemblance to the duty that was owed to a licensee at common law. Initially at common law an occupier was liable to a licensee for injuries caused by a concealed danger if the occupier had actual knowledge of the danger. Eventually, the requirement of actual knowledge was relaxed, and it was sufficient for liability if the occupier had knowledge of facts from which a reasonable person would infer that such a danger existed. However there was no duty on an occupier to inspect his premises for such dangers.

[202] The third requirement in the British legislation in order for the duty to apply is intended to make it clear that the duty is far less onerous than the duty owed to a visitor.[164] The Law Commission contemplated that natural hazards in open country would frequently not be dangers against which, in all of the circumstances an

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[163] *Supra* note 22.

[164] Great Britain, Law Commission, *Report on Liability for Damage or Injury to Trespassers and Related Questions of Occupiers' Liability* (London: H.M.S.O., 1976).

occupier could reasonably be expected to offer an entrant any protection and therefore no duty would arise.[165]

[203] In developing an intermediate standard for NCRUs it would be necessary to consider some important elements. For example, must an occupier actually know of a dangerous condition to incur liability, or is constructive knowledge sufficient? There is a distinction between knowledge of a danger and knowledge of a condition that may pose a danger. At common law, once an occupier was shown to have subjective knowledge of a condition that could pose a danger, the court applied an objective test in terms of whether or not a reasonable person would have understood the condition to pose a danger. Should there be a duty on an occupier to inspect premises to identify possible dangers? If an occupier is negligent in failing to observe a danger will liability ensue? Should it matter if the condition is as equally visible to a NCRU as it would be to the occupier? Having identified a danger, should an occupier be liable if they negligently fail to guard or warn against that danger, or must the failure be intentional?

[204] Assuming that a relaxation in liability might increase access, it seems clear that this intermediate standard would have less effect than the first. It would also lead to a distinction between lawful NCRUs and trespassing NCRUs and thus perpetuate, in the context of recreational use, any concerns over implied permission that exist under the current regime.[166] In the context of the current occupiers' liability regime, creating an intermediate standard of care for NCRUs would introduce added complexity to what was intended to be a simplified regime. The application of different duties based on the different characteristics of entrants was one of the major criticisms of the common law of occupiers' liability. It was a desire to eliminate this type of rigid stratification that was the motivation behind the Alberta legislation and behind the creation of a single duty of care in a number of jurisdictions who have adopted occupiers' liability legislation.

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[165] *Ibid.* at 18.

[166] Implied permission is discussed in Appendix B at 101.

D. Conclusion

[205] Readers who are familiar with Institute publications will recognize that this is an atypical final report. We make no recommendations, nor do we provide suggested draft legislation. Instead, we have tried to set out issues that we think are important in considering whether to change occupiers' liability law with regards to non-commercial recreational users and, if so, what changes might be made.

[206] There are a number of reasons why we have taken this different approach. First of all we lack an adequate factual foundation from which to conclude whether or not there is a recreational access problem that needs addressing, and we are not in a position to undertake that assessment ourselves. Secondly, we have no information to suggest that the solution which has been proposed has had the desired effect in other jurisdictions, or that it would have the desired effect in Alberta. In the absence of this information, we do not feel that it is appropriate to take a position on whether or not the law should be changed. Finally, if a decision is made to reform the law, many of the ensuing choices depend on the value to be given to the promotion of recreational access as against the possible negative consequences for NCRUs or on other policy questions that in these circumstances are more appropriately answered by the Legislature.

[207] So why issue a report at all? We felt that we could assist the Minister and other decision makers in considering the policy choices to be made, the issues to be considered, and the options to be canvassed if any legislation that is enacted may achieve its objectives and avoid undesirable side effects. The comments and discussion included in this report should be viewed in that light.

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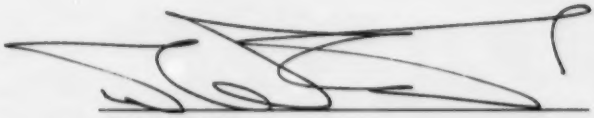

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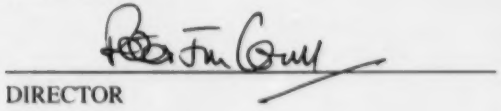

DIRECTOR

February 2000

APPENDIX A

Public Access To Land For Recreational Purposes

A. Public Rights of Access in Alberta

1. Private Lands

"Anglo-Canadian jurisprudence has traditionally recognized, as a fundamental freedom, the right of the individual to the enjoyment of property and the right not to be deprived thereof, or any interest therein, save by due process of law."[167] Part of this fundamental freedom is the right of a property owner to decide who may or may not enter onto their property.

At common law, it is arguable that the public could acquire the "right to ramble" on private land by using that land for a continuous and uninterrupted period of time.[168] In legal terms acquiring rights to an easement through continuous use is referred to as prescription.[169] In Alberta however, such prescriptive rights have been abolished by the *Law of Property Act*.[170]

There are no statutory provisions in Alberta allowing recreational access to private lands either generally or on a limited basis. In short, NCRUs have no legal right of access to private lands for recreational use. They can enter only with permission.

As a practical matter, the ability of a landowner to exclude recreational users from their property varies according to a number of factors including the location of the land, its size and its accessibility. The *Petty Trespass Act*[171] and the *Trespass*

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[167] *Harrison* v. *Carswell*, [1975] 6 W.W.R. 673 at 680 (S.C.C.).

[168] A detailed discussion of the history of these rights in England can be found in: T. Bonyhady, *The Law of the Countryside: the Rights of the Public* (Abingdon: Professional Books, 1987).

[169] B.H. Ziff, *Principles of Property Law*, 2d ed. (Toronto: Carswell, 1996) at 342-345.

[170] R.S.A. 1980, c. L-8, s. 60(3).

[171] *Supra* note 159.

to Premises Act,[172] provide some assistance to landowners in discouraging trespass. These acts provide a mechanism for removing unwanted trespassers and provide for the imposition of sanctions on those who trespass. Landowners also have the common law right to bring a civil action in trespass. However, the efficacy of this remedy is severely limited by cost and other considerations.

Many NCRUs may be currently using private lands for recreation without permission, even though the use is not legal.

2. Crown Land

a. Generally

The bulk of Crown Land in Alberta is governed by the *Public Lands Act*.[173] The term "Public Land" is the term chosen by the government to describe Crown Land administered under that Act as distinct from other Provincial and Federal Crown Lands . Although it might appear logical that members of the public should *prima facie* have a right of access to "public" lands, the legal basis for this conclusion is far from clear.

Canadian property law has its origins in English law. Historically, in Anglo-Saxon England there may have been a concept of public land in the sense of land considered to belong to the community at large. However, this concept was gradually eroded and then, in 1066 extinguished by the conquest of England.[174] After the conquest, there ceased to be any real distinction between lands owned by "the Crown" and lands owned by the King in his personal capacity.[175]

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[172] *Supra* note 160.

[173] R.S.A. 1980, c. P-30.

[174] K.E. Digby, *The Law of Real Property* (Oxford: Clarendon Press, 1875) at 27:

> By the conquest or acquisition of England William succeeded to all the rights of the Anglo-Saxon kings. The rights over the land which they had became his. The great possessions held by them in their private capacity devolved upon William, and no distinction any longer existed between the king's ownership of land in his private capacity and his suzerainty over the folcland as chief of the nation. All alike became *terra regis*. Besides the land to which he thus became entitled as the legitimate successor of the Anglo-Saxon kings, all the land held by those who had resisted him was, by the customary law of both England and Normandy, forfeited to the king.

[175] F. Pollock and F.W. Maitland, *History of English Law*, vol. 1, 2d ed. (Cambridge: Cambridge University Press, 1911) at 511ff.

The common law did provide for public rights of access to certain types of Crown Land. For example, the public had the right to travel on "highways", to access public highways directly adjacent to private land and to access navigable waterways. As in the case of private land, a "right to ramble" on Crown Land could arguably arise through prescription.

Some of these limited rights have been altered by statute. Highways are governed by the *Public Highways Development Act*,[176] which in section 23 abrogates the common law rights of access to a public highway from adjacent lands. In addition, s.4 of the *Public Lands Act* has abolished the acquisition of rights in land as against the Crown by prescription.

Nothing in the *Public Lands Act*, or in any other Alberta statute dealing with Crown Lands grants the public general rights of access to those lands for recreational use or otherwise. Reference to other Alberta Statutes dealing with Crown Lands such as the *Forests Act*,[177] *Forest Reserves Act*,[178]and the *Wilderness Areas, Ecological Reserves and Natural Areas Act*,[179] indicates that in many cases the relevant Minister is given the authority to regulate entry onto those lands and to regulate and prohibit recreational activities.

There is a dearth of case law in Alberta and in the rest of Canada dealing with the issue of public rights of access to Crown Lands. Presumably this is because the public exercises a *de facto* right of access to many Crown Lands regardless of the legal situation.[180] In addition, many of the provincial governments in Canada, including the Government of Alberta purport to follow a policy of integrated resource management which includes recreation as a use to be

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[176] R.S.A. 1980, c. P-28.

[177] R.S.A. 1980, c. F-16.

[178] R.S.A. 1980, c. F-15.

[179] R.S.A. 1980, c. W-8.

[180] "(Public) (l)and that is not under disposition is considered "vacant". The public can use this land for temporary activities that don't result in any physical damage to the area." Alberta, *Recreational Access and Use of Public Lands* (Edmonton: Alberta Agriculture, Food and Rural Development; Alberta Environmental Protection, 1997), online: Government of Alberta <http://www.agric.gov.ab.ca/publiclands/publan14a.html> (last modified: October 23 1997).

considered in land use planning. Some Crown Lands are specifically set aside for public recreational use and enjoyment.

b. Public Lands under disposition

The Crown may grant various rights in public land, including title, by way of a "disposition" under the *Public Lands Act*.

The position of the Government is that most dispositions require that permission be obtained from the disposition holder before the public may venture onto the land.[181] There is no reference to any legal basis for this suggestion.

The legal position of a member of the public seeking access to crown land under disposition is unclear. In *R.* v. *Sutherland*, a Supreme Court of Canada case involving criminal charges for hunting on a Wildlife Management Area, Dickson, J. commented "it is arguable that where the Crown has validly occupied[182] lands there is prima facie no right of access, as is the case with land occupied by private owners, save and except that right of access the Crown confers on the public and/or Indians as occupant of the land."[183]

The only judicial consideration of the issue in Alberta has been in relation to grazing leases.[184] In *O.H. Ranch Ltd.* v. *Patton*,[185] a grazing lessee sought an injunction against a hunter who had hunted game on part of the leased land without the lessee's permission and who had indicated that he intended to continue doing so. The Alberta Court of Appeal concluded that the grazing lease was in form and

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[181] *Ibid.*

[182] "Occupied" referred to s. 12 of the Natural Resources Agreement of 1929 which granted certain rights in relation to unoccupied Crown Lands. At the time of the judgment, occupied in this context was understood to refer to land which the Crown in right of the province had appropriated or set aside for special purposes. See *R.* v. *Smith*, [1935] 2 W.W.R. 433 at 438 (Sask. C.A.).

[183] [1980] 5 W.W.R. 456 at 462.

[184] As of March 31 1997 grazing leases comprised 4,981,221 acres out of 6,489,443 acres of land under disposition in the White Area (settled portion of public land). Alberta, *Dispositions Under the Public Lands Act* (Edmonton: Alberta Agriculture, Food and Rural Development; Alberta Environmental Protection, 1997), online: <http://www.agric.gov.ab.ca/publiclands/publan21.html> (last modified October 27, 1997).

[185] (1996), 187 A.R. 232 (Alta. C.A.).

substance a lease subject to the conditions imposed by the Minister, and that the lease granted exclusive occupation to the lessee consistent with its right to graze livestock on the lands. Accordingly, at the very least, the lessee had the exclusive right to occupy the leased land as it related to the rights granted under the grazing lease including the right to bar access or use that might be injurious or incompatible with the lessee's rights. Hunting on grazing lease lands without consent was, in the view of the Court, clearly an incompatible use.

The Court declined to list or broaden the nature and scope of other possible incompatible intrusions on grazing lease lands and stopped short of declaring that the grazing lease conferred on the lessee a right to exclusive possession. The decision does not give any guidance as to who has the right to control access to grazing lands for purposes which are not incompatible with the lessee's rights.

The characterization of the grazing lease in *O.H. Ranch* v. *Patton* as "a lease subject to the conditions imposed by the Minister" is somewhat confusing . A lease is a demise of land which grants exclusive occupation of that land to the tenant,[186] yet the Court was only prepared to find that the lessee had the right to bar access or use that was injurious or incompatible with the lessee's rights under the grazing lease. The judgment does not reference any conditions imposed by the Minister that relate to public rights of access. In the result, the decision is of little assistance in assessing the rights of NCRUs to enters grazing leases or other public lands under disposition.

In November 1998 the Government issued a report dealing with management issues on public lands in agricultural areas. The report recommended that agricultural leaseholders be designated as "gate-keepers" for recreational access to a grazing disposition and that any recreational user seeking access be required to obtain permission from the leaseholder. The report also recommended that the leaseholder should allow reasonable access and that a mechanism would be made available for disputes over access through the Department of Agriculture, Food and Rural Development.[187]

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[186] Ziff, *supra* note 169 at 248.

[187] *Supra* note 53.

The Agricultural Lease Review Report formed the basis for *The Agricultural Dispositions Statutes Amendment Act, 1999 (ADSAA)*.[188] Among other things, the *ADSAA* amends the *Public Lands Act* by adding section 59.1 which provides as follows:

> 59.1(1) The holder of an agricultural disposition shall, in accordance with the regulations, allow reasonable access to the land that is the subject of the disposition to persons who wish to use the land for recreational purposes.
>
> 59.1(2) The Minister may make regulations
>
> (a) classifying agricultural dispositions for the purposes of this section and the regulations;
>
> (b) respecting what constitutes reasonable access in respect of agricultural dispositions or classes of agricultural dispositions;
>
> (c) defining and classifying recreational purposes and setting out the nature and extent of the right of reasonable access with respect to specified recreational purposes on specified classes of agricultural disposition lands;
>
> (d) respecting terms and conditions applicable to the exercising of a right of reasonable access under this section;
>
> (e) governing rules and procedures for obtaining reasonable access for the purposes of this section and rules and procedures that apply where reasonable access is denied including, without limitation, regulations authorizing the Minister to
>
> (i) refer the matter to a dispute resolution process established pursuant to regulations under section 9(a.2),
>
> (ii) make orders denying access or directing the agricultural disposition holder to permit reasonable access, subject to any terms and conditions the Minister considers appropriate.

In the absence of the regulations, it is not yet clear what constitutes "reasonable access" and so it is difficult to assess what rights the amendment actually gives to recreational users in relation to agricultural dispositions.[189]

The right of the public to access other public lands under disposition remains uncertain.

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[188] *Supra* note 10. The Act comes into force on proclamation. At the time of writing it had not yet been proclaimed. Pursuant to s. 4(2)(a), agricultural disposition means a disposition under the *Public Lands Act* that is made for agricultural purposes, but does not include a conveyance, assurance, sale or agreement for sale.

[189] Draft regulations have been circulated for discussion: *Discussion Document on Draft Regulations*, *supra* note 11. The deadline for responses was January 31st, 2000.

B. Conclusion

In Alberta the public has no legal right of access to private property for recreational use without permission.

In the absence of consent to entry, public rights of access to Crown Lands in Alberta are tenuous if they exist at all. Although the Government of Alberta espouses a policy of multiple use for its lands and "generally views recreation as compatible with many other uses of the land",[190] the Government has the ability to restrict access through legislation if it sees fit to do so for any reason, including liability concerns.

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[190] *Recreational Access, supra* note 180.

APPENDIX B

Occupiers' Liability Law and the Recreational User

A. Introduction

This appendix contains a general description of occupiers' liability law. Its purpose is to provide a background for the discussion of the specific recreational use issues that are contained in the main report.

Occupiers' liability law is the area of tort law concerned with the responsibilities of occupiers of property to individuals who are injured on their property. Historically, the undisputed right of a landowner to the uninterrupted use and enjoyment of their property severely limited those responsibilities.[191] However, more recently the trend has been to increase those responsibilities by bringing this area of the law into line with the rest of modern negligence law.[192]

At common law the duty owed by the occupier to an entrant depended on whether the entrant was classified as a trespasser, licensee or invitee. Concerns that the common law failed to give practical guidance to occupiers and that it forced the Courts to concentrate on technicalities to the exclusion of legal principles led this Institute (then known as the Institute of Law Research and Reform) to recommend reform through legislation.[193]

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[191] See *e.g.* V. Di Castri, *Occupiers' Liability* (Carswell, 1981) at para.1.

[192] Modern negligence law has its origins in the decision in *Donoghue* v. *Stevenson*, [1932] A.C. 562. The House of Lords expanded the nature of the relationship that gives rise to legal obligations by creating the now famous "neighbour principle":

> You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be—persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question (*ibid.* at 580).

[193] Report 3, *supra* note 27.

B. The Occupiers' Liability Act and Recreational Use

1. The *OLA* Generally

The *Occupiers' Liability Act*[194] *(OLA)* came into force in Alberta in 1974. Although the *OLA* does not expressly state that it replaces the common law previously in existence,[195] there does not appear to be any dispute that this is the case. Accordingly, the law of occupiers' liability in Alberta is governed entirely by the *OLA*.

The most commonly quoted description of the effect of the *OLA* on the common law is that of the Alberta Court of Appeal in *Preston* v.*Canadian Legion*:

> ... Firstly, it does away with the difference between invitees and licensees and puts both invitees and licensees into the common defined class of visitor. That in itself is a very helpful improvement in the law. Secondly, and more importantly, the statute now imposes an affirmative duty upon occupiers to take reasonable care for the safety of people who are permitted on the premises. This change is most marked because it does away with the old common law position that an occupier was only liable for unusual dangers of which he was aware or ought to have been aware. Under the old law the occupier could escape liability by giving notice. Now, the occupier has to make the premises reasonably safe....[196]

This approach to occupiers' liability legislation has been endorsed by the Supreme Court of Canada.[197]

When an entrant is injured as a result of the condition of premises, activities on premises, or the conduct of third parties on premises, the *OLA* applies.[198] There is no distinction made between entrants who are engaged in recreational activities and entrants who are not.

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[194] *Supra* note 1.

[195] Some other *OLA*s specifically provide that the legislation applies in place of the rules of common law: Man. *OLA*, *supra* note 6 s. 2; N.S. *OLA supra* note 6 s. 3; Ont. *OLA*, *supra* note 6 s. 2; and P.E.I. *OLA supra* note 6 s. 2. In New Brunswick the law of occupiers' liability has been abolished. Any matter which would have been determined in accordance with the law of occupiers' liability is determined in accordance with other rules of liability : *Law Reform Act*, N.B.S. 1995, c. L-1.2, s. 2(2).

[196] (1981), 29 A.R. 532 at 536.

[197] *Waldick* v. *Malcolm* (1991), 83 D.L.R. (4th) 114.

[198] *OLA*, *supra* note 1, s. 6. If the occupier has some discrete relationship with the entrant other than as occupier of the premises, then in that capacity the occupier may owe a separate duty to the entrant as well. Further discussion on this point may be found 104-105, below.

2. "Premises" covered by the Act

The *OLA* imposes duties on occupiers of "premises." At common law premises was understood to include any land and buildings which were part of land and this is how it has been treated under the legislation. The Act has been applied to everything from bare land[199] to elevators in an office building.[200] In addition, premises are defined in the *OLA* to include a number of items that might not otherwise be considered to be premises (such as staging, scaffolding and similar structures erected on land whether affixed to it or not).[201]

A few types of land are specifically excepted from the operation of the *OLA*.[202] Aside from cases dealing with those types of lands, there do not appear to be any cases in Alberta in which a defendant has successfully argued that an area where an injury occurred was not "premises" under the *OLA*. This issue is of little significance to a recreational user, as in all but a negligible number of cases, the area where an injury occurs will be considered premises within the meaning of the Act.

3. Who are "occupiers"?

A person who has physical possession of premises is an occupier. So is a person who has responsibility for, and control over the condition of premises, the activities conducted on premises and the persons allowed to enter the premises. For the purposes of the Act, there may be more than one occupier of the same land.[203] For example, where an owner of lands engages a contractor to perform work on those lands, both the owner and contractor may be occupiers under the *OLA*. However, where land is leased to a tenant, the tenant would be an occupier,

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[199] See *eg. Tobler* v. *Canada (Min. of Env.)*, [1991] 3 W.W.R. 638 (F.C.T.D.) (wooded area immediately adjacent to the Banff townsite); *Rudko* v. *Canada*, [1983] F.C.J. No. 915 (T.D), online QL (FCJ) (wilderness area in Banff National Park marked with rudimentary trails); *Meier* v. *Qualico Developments*, *supra* note 28 (grassland partially under development).

[200] *Popjes v. Otis Canada Inc.* (1995), 171 A.R. 376 (Q.B).

[201] *OLA*, *supra* note 1, s. 1(d).

[202] Pursuant to s. 4, the *OLA* does not apply to private streets as defined in the *Law of Property Act*, or to highways under the administration, management or control of a Minister of the Crown in right of Alberta, the Crown in right of Canada, a municipal corporation or a Metis settlement.

[203] *OLA*, *supra* note 1 s.1(c).

while the actual owner, having given exclusive possession to the tenant, would not be.

4. The Duty Owed by an Occupier

The liability of an occupier to an entrant to their premises depends on whether the entrant is a visitor or a trespasser.

a. Visitors

i. Generally

"Visitor" is defined in section1(e)(i) of the *OLA* to mean:

> (i) an entrant as of right,
>
> (ii) a person who is lawfully present on premises by virtue of an express or implied term of a contract,
>
> (iii) any other person whose presence on premises is lawful, or
>
> (iv) a person whose presence on premises becomes unlawful after his entry on those premises and who is taking reasonable steps to leave those premises.

The duty owed by an occupier to a visitor is the duty "to take such care as is reasonable in all of the circumstances of the case to see that a visitor will be reasonably safe in using the premises for the purposes for which he is invited . . . or permitted by law to be there."[204] This duty is referred to in section 1(a) of the *OLA* as the "common duty of care". The intent of creating a common duty of care to lawful entrants on premises was to bring occupiers' liability law within the "current" of modern negligence law.[205]

It should be noted that the common duty of care is not the same as the duty that was owed to an invitee at common law. At common law an occupier was only liable to an invitee for damage caused by unusual dangers of which they were aware or ought to have been aware. Whether or not a danger is unusual is no longer a determining factor in applying occupiers' liability law in Alberta.[206]

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[204] *OLA*, *supra* note 1, s. 5.

[205] Report 3, *supra* note 27 at 46.

[206] Eg. *Preston*, *supra* note 196 at 536; *Mann* v. *Calgary* (1995), 167 AR. 133 at para 34 (Q.B.). This is important to keep in mind when considering cases from other provinces which operate under a common law regime and therefore still apply the unusual danger test.

In theory, an occupier who invites or permits a person onto their premises is in a position to know of or foresee potential dangers and to take steps to avert accidents. In this way the relationship between the occupier and the entrant is analogous to the "neighbour" relationship[207] discussed in negligence cases. In fact, cases dealing with injuries on premises sometimes use the duty owed in negligence law in lieu of the common duty of care or refer to both the neighbour duty and the common duty of care, concluding that under either test the result would be the same.[208]

ii. The Common Duty of Care

In applying the common duty of care in occupiers' liability situations, the courts have developed a number of general principles. The first consideration is whether or not the event from which injury was suffered was reasonably foreseeable. It is not necessary to determine whether the occupier actually foresaw the event, only whether a reasonable person knowing the facts would have foreseen it. If the event was foreseeable, then it is necessary to consider whether a reasonable person would have foreseen that injury was likely to follow. Again the test is objective. The mere fact that an injury occurred does not make the injury foreseeable.[209]

Where premises are [illegible] and can be easily inspected, putting the onus on the occupier to keep entrants reasonably safe does not seem unduly onerous. However, premises that are desirable for recreational use will frequently be larger premises that may be difficult, expensive or impossible to inspect. The *OLA* addresses this problem by requiring only that the occupier "take such care as in all the circumstances of the case is reasonable." Therefore, the occupier of large tracts of land incapable of inspection need not take the same precautions as a residential homeowner and conceivably in some circumstances need not take any affirmative steps at all.[210]

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[207] *Supra* note 2 and accompanying text.

[208] See *e.g. Worobetz* v. *Panorama Resort (Title Holding) Corp.* (1993), 9 Alta. L.R. (3d) 38 at 42 (Q.B); *Popjes*, *supra* note 200. The interaction between negligence law and occupiers' liability law is discussed in more detail at 104, below.

[209] *Nasser* v. *Rumford* (1978), 5 Alta. L.R. 84 at 89 (Alta. S.C.), leave to appeal to S.C.C. refused (1978), 9 A.R. 449n.

[210] See text accompanying note 245.

In determining whether or not an occupier has acted reasonably, the court can take into account the cost of taking steps to increase the safety of the premises. An occupier is not required to take every conceivable measure to make premises safe for entrants without regard to its cost relative to its effectiveness in reducing the risk of injury.[211]

A court can also take into account prior incidents causing injury which have occurred on the premises. The customary practice of a profession or industry or the customs of occupiers in similar circumstances is relevant. A court may consider the opinions of experts in coming to a conclusion on whether premises were reasonably safe; however, the consensus of a group of experts is not binding.[212]

An occupier's duty to take reasonable care does not absolve a visitor to premises from taking reasonable care for their own safety.[213] The converse is also true. A visitor who does not take reasonable care may still be able to recover damages from an occupier depending on the degree of their contributory negligence. The question to be asked is whether the occupier could reasonably foresee a risk to visitors exercising ordinary diligence. If so, then the occupier has breached their duty, regardless of the visitor's conduct.[214]

Furthermore, the *OLA* only requires an occupier to take reasonable care to see that a visitor is reasonably safe in using the premises for the purposes for which they are invited or permitted to be there. This is a slightly different approach from the other Canadian jurisdictions which by implication require the premises to be safe for all purposes.[215]

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[211] See *e.g. Schwab v. Alberta* (1986), 75 A.R. 1 (Alta. C.A.); *Diodoro* v. *Calgary (City)* (1990), 108 A.R. 139 (Q.B.).

[212] Although it is strong evidence. *Warren* v. *Camrose (City)*, (1989), 92 A.R. 388 (C.A.), leave to appeal to S.C.C. refused (1989), 100 A.R. 395n.

[213] *Preston, supra* note 196 at 536; *Epp* v. *Ridgetop Builders Ltd.* (1979), 15 A.R. 120 (S.C.(T.D.)).

[214] *Lorenz* v. *Ed-Mon Developments Ltd.* (1991), 118 A.R. 201 at 202 (C.A.).

[215] *OLA supra* note 1 s. 5 and see comments in *Slaferek* v. *TCG International Inc., supra* note 28 at paras. 87-89.

iii. The Common Duty of Care and Public Occupiers

Where the occupier is a public body, there is an additional consideration in applying the common duty of care. It is necessary to consider whether the injury-causing conduct of that body stemmed from an operational decision or a policy decision. In negligence law, a public body is exempt from the application of the traditional tort law duty of care if the decision subject to the duty is a pure policy decision made in the *bona fide* exercise of discretion. The exemption does not apply if the decision is operational. The dividing line between policy and operational decisions is not easy to draw. Generally, decisions concerning the allocation of budgetary funds will be classified as policy decisions whereas decisions relating to the manner and quality of an inspection system are operational decisions.[216] In order to keep the duty imposed under the *OLA* on public bodies consistent with the duty imposed in negligence law on public bodies, the policy / operational analysis should be applied when dealing with public bodies in their capacity as occupiers.[217]

iv. Voluntary Assumption of Risk

Under s.7 of the Occupiers' Liability Act, an occupier is not under an obligation to discharge the common duty of care to a visitor in respect of risks willingly accepted by the visitor.

This section, and similar sections in other provinces have been interpreted as codifying the common law defence of *volenti non fit injuria* (ie. that no wrong is done to one who consents). In order for the section to apply the plaintiff must have assumed the physical risks of an activity and also must have assumed the legal risk, in the sense of accepting the risk of injury that might result without recourse to any other party. In effect, the plaintiff must have explicitly or implicitly waived their right to sue the defendant. Mere awareness of the physical risk is not enough to establish the defence of assumption of risk.[218]

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[216] *Just* v. *British Columbia*, [1989] 2 S.C.R. 1228 at 1245.

[217] See *Vannan* v. *Kamloops (City)* (1991), [1992] 2 W.W.R. 759 at paras. 14 to 17. (B.C. S.C.). We say "should" because some cases seem to ignore this concept in the context of occupiers' liability law.

[218] *Preston*, *supra* note 196; *Malcolm*, *supra* note 197.

The limited scope of section 7 was highlighted in the context of recreational use in *Murray* v. *Bitango*.[219] In *Murray*, the defendant was the lessee of a riding arena and the president of a riding club. The plaintiff attended a meeting of the club at which a discussion took place to the effect that members of the club used the arena at their own risk. The trial judge found that the plaintiff accepted this condition as part of the agreement with the defendant for her use of the arena.

While using the arena one day, the plaintiff tied her horse to a feed chute. The horse pulled back, causing the unsecured chute to fall on the plaintiff and render her a paraplegic. Since the possibility of the unsecured chute tipping was a foreseeable risk, the defendant was found to be in breach of the duty owed under the *OLA*.

The Court of Appeal rejected the defence of assumption of risk, reiterating that in order to establish a defence under s.7, an occupier must show that the plaintiff: (1) was aware of the "virtually certain risk of harm"; and (2) assumed both the physical and *legal* risk of entry. The Court said that at most the evidence accepted by the trial judge established a general intention on the part of the defendant that users of the arena would use it at their own risk. There was no evidence of an agreement as to exactly what risks were meant to be voluntarily assumed by the plaintiff, or that the plaintiff had agreed expressly or implicitly to waive her right of action for injuries arising out of the 'negligence' of the defendant.

In the absence of a written waiver, it will be a rare case where an injured visitor is found to have voluntarily assumed all of the risks of entering premises. Many commercial recreational facilities have dealt with issues of risk assumption through the use of written waivers and releases. Ski hills often require season pass holders to sign written waivers when applying for their passes. In addition, signs warning skiers of potential risks are prominently displayed as well as being printed on lift tickets. Written agreements waiving legal rights of action against occupiers have also been used by some non-profit recreational organizations as a means of encouraging landowners to allow them access to premises. The use of written agreements may be one approach to be considered in the context of non-

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[219] (1996), 38 Alta. L.R. (3d) 408 (C.A.).

commercial recreational use. However, this approach is impractical where recreational use is unorganized and sporadic or where the occupier does not actually inhabit the relevant premises.

In talking about risk it must be kept in mind that there is a distinction between the voluntary assumption of risk and the concept of "inherent risk". If a person participates in an activity that is inherently risky and is injured **solely** as a result of that inherent risk, the law does not impose liability on the occupier of the premises where the injury occurred.

The comments of Madam Justice Wilson in relation to inherent risk in *Crocker* v. *Sundance Northwest Resorts*, are instructive in this regard:

> People engage in dangerous sports every day. They scale sheer cliffs and slide down the sides of mountains. They jump from airplanes and float down white water rivers in rubber rafts. Risk hangs almost palpably over these activities. Indeed, the element of risk seems to make the sports more attractive to many. Occasionally, however, the risk materializes and the result is usually tragic.
>
> In general, when someone is injured in a sporting accident the law does not hold anyone else responsible. The injured person must rely on private insurance and on the public health care system. The broad issue in the present appeal is whether there is something to distinguish the situation here from the run of the mill sports accident...[220]

In *Crocker*, the plaintiff was injured in an inner-tube race down a ski-hill. The defendant owner of the hill was also the organizer of the race. The defendant was found liable in negligence, not for organizing an inherently dangerous activity, but for allowing someone whom they knew to be drunk to participate in it. The defendant's liability as occupier was not discussed.

It is easy to see that cases such as *Bitango* could create concerns for occupiers as to what is required of them in order to fulfill their duty to recreational users. Under the proposed recreational user provisions the issue of voluntary assumption of risk becomes irrelevant.

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[220] [1988] 1 S.C.R. 1186 at 1192.

v. The Common Duty of Care and Recreational Use

Until the proclamation of the *ADSAA* all occupiers owe a common duty of care to recreational users lawfully on their premises.[221]

The common duty of care set out in the *OLA* is designed to be able to deal with a variety of situations involving different types of premises, occupiers and visitors. However, the flexibility of the common duty of care may also be the source of some occupiers' concerns about their potential liability to recreational users permitted onto their premises. Despite the development by the courts of general principles in applying the *OLA*, it remains difficult for occupiers to assess in advance what a reasonably safe premises might be, or what reasonable steps should be taken to create that level of safety. The determinations in occupier liability cases are fact-driven, and no two fact situations are identical. An occupier who relies on their own common sense in assessing reasonable behaviour might proceed to trial or to appeal only to encounter a judge with an entirely different concept of reasonableness. Therefore, the criticism that the common law failed to give practical guidance to occupiers might well be made of the current statutory regime.

Although occupiers' liability law might seem uncertain to an occupier, it should be pointed out that the common duty of care is in theory no more onerous than the duty imposed under modern negligence law. It is a more difficult question whether modern negligence law continues to represent a reasonable standard to measure occupiers' liability law against. Certainly there are those who argue that Canadian courts have expanded negligence law beyond its conceptual limits.

b. Trespasser

i. Adult Trespassers

There is no definition of trespasser in the *OLA*. However, by implication anyone who is not a visitor must be a trespasser.[222] Pursuant to section 12 of the *OLA*, an

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[221] As explained in Chapter 1 at 5, after proclamation of the Act, occupiers who are agricultural disposition holders will be governed by the new section 11.1 of the *OLA*. After proclamation, the liability of a disposition holder to a recreational user covered by section 11.1 will be determined as if the recreational user was a trespasser.

[222] *Houle* v. *Calgary (City)* (1985), 60 A.R. 366 (C.A.), leave to appeal to S.C.C. refused (1985), 63 A.R. 79n.

occupier is only liable to an adult trespasser for damages for death of or injury to a trespasser that results from the occupier's wilful or reckless conduct.

Section 12 of the *OLA* was intended to codify the traditional common law approach that an occupier was only liable to a trespasser for an "... act done with the deliberate intention of doing harm to the trespasser, or at least some act done with the reckless disregard of the presence of the trespasser."[223] The occupier had to know that a trespasser was on the premises. There was no liability if the trespasser was merely foreseeable.

The English courts used various fictions to avoid the common law's harsh effect on trespassers. These included finding implied licences as a means of elevating an entrants status to that of licensee, drawing distinctions between injuries caused by activities on the premises rather than the condition of premises and expanding the scope of the meaning of wilful or reckless conduct. Eventually, the traditional approach was abandoned as being out of step with the development of the rest of negligence law and with changes in physical and social conditions. In *Herrington* v. *British Railways*[224] the House of Lords created a duty of common or ordinary humanity towards trespassers. In 1974, the Supreme Court of Canada followed *Herrington* in holding that occupiers owe a duty of ordinary humanity to trespassers.[225]

The exact nature of the duty of ordinary humanity is far from clear. For the purposes of this discussion it is sufficient to say that the duty falls somewhere between the common duty of care and the traditional approach taken towards trespassers.[226] In provinces that have not passed occupiers' liability legislation, the duty owed by occupiers to adult trespassers remains the duty of ordinary

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[223] *Robert Addie & Sons (Collieries) Ltd.* v. *Dumbreck*, [1929] A.C. 358 at 365 (H.L.) [hereinafter *Addie*].

[224] [1972] A.C. 877 (H.L.) [hereinafter *Herrington*].

[225] *Veinot* v. *Kerr-Addison Mines Ltd.*, *supra* note 21.

[226] It appears that the English courts had some difficulty in applying this duty with any consistency. This was one of the factors that led to the *Occupiers' Liability Act of 1984* which created a statutory duty owed by occupiers to trespassers. See text accompanying note 163.

humanity.[227] In provinces that have occupiers' liability legislation, other than Alberta, the distinction between visitors and trespassers has largely been abolished.

The Alberta *OLA* was enacted after *Herrington* was decided, but before that decision was approved by the Supreme Court in *Veniot*. There is no discussion in Hansard of the *Herrington* decision at the time the legislation was passed and so it is unclear whether this development in the law was considered and rejected when the current trespasser section was adopted.[228]

(a) Wilful or Reckless Conduct.

Section 12 of the *OLA* imposes liability on an occupier to a trespasser for damages for injury or death resulting from the occupier's wilful or reckless conduct. Wilful conduct requires a deliberate act intended to cause injury. Reckless conduct has not been as clearly defined. "Reckless" in the context of the *Addie* decision has been described in various ways ranging from conduct akin to intentional wrongdoing to gross negligence.[229] At a minimum the common law required that the occupier know of, or have reason to believe in the presence of the trespasser and that his or her conduct show an indifference to the safety of the trespasser.[230] Some Canadian courts have stated the question as whether the occupier did or omitted to do something which they should have recognized as likely to cause damage or injury to a trespasser, not caring whether or not such damage or injury would result.[231] Additional considerations include the ease with which an accident could have been prevented and the magnitude of the injuries which were foreseeable if simple precautions were not taken.[232]

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[227] See eg. *Anderson* v. *Whitepass Transportation Ltd.*, [1994] Y.J. No. 9 (YCA) (YJ).

[228] The Institute's Report 3 was released prior to both the *Herrington* and *Veinot* decisions and therefore there is no discussion of them in that report.

[229] *Cormack* v. *Mara (Township)* (1989), O.A.C. 55 at paras. 23-25, leave to appeal to S.C.C. refused (1989), 60 D.L.R. (4th) vii; *Slaferek*, *supra* note 28 at para 97.

[230] *Haynes* v. *C.P.R.* (1972), 31 D.L.R. (3d) 62 at 66 (B.C.C.A) aff'd [1975] 1 W.W.R. 288.

[231] *Cormack*, *ibid.* at para 29; *Smith* v. *Atson Farms Ltd.*, [1997] B.C.J. 677 (B.C.S.C.), online: QL (BCJ).

[232] *Cullen* v. *Rice* (1981), 27 A.R. 361 (C.A.).

There have been very few reported decisions in Alberta dealing with adult trespassers. This may be a reflection of the rather Draconian effect of section 12 to the extent that the injured parties are discouraged from starting actions, or feel obliged to settle before trial. Whatever the reason, the lack of case law makes it difficult to provide a clear definition of the term "reckless" as used in the Alberta act.

(b) The Issue of Implied Permission

We noted above that the *Addie* decision prompted the English courts to create a number of ways to avoid its application. One of these was the concept of an implied licence, described in *Herrington* as follows:

> If, after a certain point not easy to define, the occupier continued to stand by and acquiesce in the coming of trespassers he was held to have given a general permission or licence to trespassers to continue to do what those trespassers had been doing. Any "licence" of this kind was purely fictitious.[233]

There is the potential for a similar sort of approach to trespassers under the *OLA*. In *Meier* v. *Qualico Developments*[234] the plaintiff was injured while riding his motor bike on lands which were under development. The plaintiff did not have express permission to be on the premises at the time of the injury. The trial judge found that the plaintiff had implied permission to be on the premises based on evidence that others had used the property for recreational purposes and that knowing this, the defendants had taken no steps to prevent such use. The Court of Appeal disagreed with the trial judge's classification of the plaintiff as a visitor in the circumstances of the case. However, the Court did not reject the possibility that permission could be inferred based on an occupier's knowledge of the presence of trespassers from time to time.

This approach ignores the distinction between tolerance and permission. An occupier who is aware of trespassers but takes no steps to exclude them does not necessarily authorize their presence. In fact, at common law an occupier was not required to take any steps to exclude trespassers.

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[233] *Herrington* , *supra* note 224 at 894.

[234] *Supra* note 28.

We are not aware of any Alberta cases other than the trial decision in *Meier* which have inferred implied permission solely from knowledge and aquiescence.[235] However, we raise this issue because we think that some occupiers perceive implied permission as a potential source of increased liability under the existing law, particularly where it is difficult or impossible to prevent trespass.

ii. Adult Trespassers and Recreational Use

In many respects the law in Alberta in relation to adult trespassers is more favourable towards occupiers than in any other Canadian province. The *Addie* test adopted in section 12 appears to represent a minimum level of liability.[236]

Even so, occupiers may perceive a risk to tolerating trespassing NCRUs. In light of the risk that permission to enter premises could be implied, landowners who might otherwise be prepared to turn a blind eye to recreational users might well be motivated to take active steps to exclude them. Whether those active steps will be considered sufficient is another problematic issue for occupiers, particularly where the nature of the premises makes it difficult or impossible to physically prevent entry.

Taken to its extreme, the concept of implied permission could even result in the imposition of a common duty of care on occupiers who have no conceivable method of excluding trespassers. The underlying rationale appears to be that as long as the presence of a trespasser is reasonably foreseeable, the trespasser becomes a "neighbour" and therefore should be treated in accordance with

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[235] The Court in *Meier* was prepared to find a withdrawal of such permission if it could be inferred. It should also be pointed out that the plaintiff, in driving over a cliff in land that was clearly under development, was found to be the author of his own misfortune.

[236] The origin of the approach towards trespassers was explained in *Herrington* as follows:

> In the early part of the last century, occupiers of land sometimes placed spring guns on their land: if a trespasser walked against a wire he would cause a gun to be fired and he might be injured. If an occupier could do as he liked on and within the confines of his own land why should he not place such guns? Yet certain trespassers who suffered injury brought claims. Could such a trespasser recover damages? The courts held that he could. There were two reasons. One was that an occupier could not do indirectly what he could not do directly: if he had been present on his land and had seen a trespasser he would not have been entitled to fire a gun at him. So he ought not to cause a gun to be fired indiscriminately and automatically if and when an intruder walked on the land. The other reason was that it was contrary to the principles of humanity to place a spring gun of which a trespasser was unaware.

Supra note 224 at 904.

negligence law principles. This is part of the reasoning behind the decision in other Canadian jurisdictions to eliminate the traditional distinction between visitors and trespassers altogether.[237] Critics of the trespasser distinction have also suggested that the common duty of care takes into account trespasser situations where although a trespasser may have been foreseeable, it is difficult for an occupier to control access to the premises or to monitor the premises or to make those premises reasonably safe.[238]

iii. Child Trespassers

The liability of an occupier to a child trespasser is dealt with in section 13 of the *OLA*:

> 13(1) When an occupier knows or has reason to know
>
> (a) that a child trespasser is on his premises, and
>
> (b) that the condition of, or activities on, the premises create a danger of death or serious bodily harm to that child,
>
> the occupier owes a duty to that child to take such care as in all the circumstances of the case is reasonable to see that the child will be reasonably safe from that danger.

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[237] See for example: Law Reform Commission of Saskatchewan, *Tentative Proposals for an Occupiers' Liability Act*, *supra* note 90; Manitoba Law Reform Commission, *Report on Occupiers' Liability*, Report #42 (Winnipeg: Law Reform Commission, 1980) at 29.

[238] Occupiers might well question this suggestion in light of the decision in *Tutinka* v. *Mainland Sand & Gravel Ltd.* (1993), 110 D.L.R. (4th) 182 (B.C. C.A.), leave to appeal to S.C.C. refused [1994] 6 W.W.R. lxxi. This decision was made under the *B.C. OLA* before the recreational user amendments in 1998. Therefore the common duty of care applied to trespassers.

In *Tutinka*, the plaintiff, who was a trespasser, was injured while riding his motorcycle on sand flats leased by a sand and gravel pit operator. The plaintiff's evidence was that he was following a trail which suddenly came to an end without warning. The defendant operator led evidence at trial that it had made a number of efforts to deter motor-cyclists from using the property and that there was nothing that it could do to keep motor-cyclists off of the premises. The company had paid for an I-beam barrier over the main entry and had instructed its employees to tell trespassers to leave the property (which was generally ineffective as use usually occurred after working hours and on weekends). It was agreed that a fence around the property was out of the question because of its cost and because openings would have to be left for road allowances and for commercial vehicles.

The trial judge was concerned that having failed to keep trespassers off the property, the defendant had not taken steps to ensure that trespassers were reasonably safe while they were on the property. In the result he found that the occupier had breached the common duty of care. The Court of Appeal upheld this finding. From an occupiers' standpoint taking all possible steps to keep trespassers off of the premises might equally have been all that should have been required in order to act reasonably in the circumstances of the case.

> (2) In determining whether the duty of care under subsection (1) has been discharged, consideration shall be given to
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> (a) the age of the child,
>
> (b) the ability of the child to appreciate the danger, and
>
> (c) the burden on the occupier of eliminating the danger or protecting the child from the danger as compared to the risk of the danger to the child.
>
> (3) For the purposes of subsection (1), the occupier has reason to know that a child trespasser is on his premises if he has knowledge of facts from which a reasonable man would infer that a child is present or that the presence of a child is so probable that the occupier should conduct himself on the assumption that a child is present.

Section 13 was based to some extent on sections 333-339 of the Restatement on Torts Second.[239] However, the Institute specifically rejected any distinction between artificial and natural conditions as well as the concept of allurement in section 339.[240] Section 13 was intended to establish a duty of reasonable care in relation to children in appropriate circumstances without placing an undue burden on the occupier.[241]

5. The Interaction Between Negligence Law and the *OLA*

There appears to be some confusion in the case law regarding the relationship between an action under the *OLA* and an action in ordinary negligence. The *OLA* specifically applies to activities on the premises as well as the condition of the premises. Therefore the only situation where a separate action in negligence would appear to be appropriate by an entrant against an occupier is where there was a completely distinct duty owed by virtue of a relationship other than that of entrant/occupier.[242] Yet there are many decisions where the two causes of action have been applied to activities carried out on premises where the only relationship between the parties is that of occupier and entrant.

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[239] *Supra*, note 108. Section 339 of the Restatement is reproduced at 57, above.

[240] [1980] 5 W.W.R. 456 at 462 (S.C.C.).

[241] Report 3, *supra* note 27 at 51ff. The option of expanding the common duty of care to all children was considered and rejected.

[242] *Houle*, *supra* note 222 at para. 5.

Since the *OLA* was designed to follow principles developed in negligence law generally, the fact that some decisions ignore any distinction between these two areas of the law might appear to be of limited significance. Indeed, in most cases applying either approach should lead to the same result. We include this discussion to raise two issues.

Firstly, there is some suggestion that the common duty of care is more onerous than the duty owed in general negligence law. Under ordinary negligence law, not doing anything to guard against an injury may be reasonable, depending on such considerations as the likelihood of injury, the gravity of possible injury and the cost of avoiding the risk of injury.[243] However, many cases refer to the common duty of care as creating an "affirmative duty"[244]. In our view this does not necessarily mean that there is always a duty on an occupier to take positive steps to address a potential danger. The category of occupiers who take "such care as in all the circumstances of the case is reasonable" could include one who does not do anything.[245] This view is consistent with the *Malcolm*[246] decision where the Supreme Court stated that the "goals of the [*OLA*] are to promote, and indeed, require *where circumstances warrant*, positive action on the part of occupiers to make their premises reasonably safe."

Secondly, a change to the *OLA* such as that proposed in relation to recreational users, makes the distinction between the two causes of action much more significant. The fact that the duty owed by an occupier to a recreational user has been lowered under the *OLA* would be of little consolation to an occupier if liability could be found based on ordinary negligence principles. This would clearly be contrary to the intent of recreational use legislation.

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[243] See L. N. Klar, *Tort Law*, 2d ed. (Scarborough, Ontario: Carswell, 1996) at 259-264.

[244] See *e.g. Preston, supra* note 196 and *Malcolm, supra* note 197.

[245] We note that there is authority to the contrary in Alberta: *Roasting* v. *Blood Band* (1999), 241 A.R.171 at para 48 (Q.B.).

[246] *Supra*, note 197 at 128 [emphasis added].

C. Conclusion

This appendix indicates that there are areas of occupiers' liability law that are worthy of review apart from issues relating specifically to recreational users. Issues such as those surrounding the possibility of courts inferring permission to enter and the limited application of the defence of voluntary assumption of risk also help explain why occupiers have concerns about their potential liability to recreational users.

APPENDIX C

List of Recreational Use Articles

John C. Barrett, "Good Sports and Bad Lands" (1977) 53 Wash. L. Rev. 1

John C. Becker, "Landowner or Occupier Liability for Personal Injuries and Recreational Use Statutes: How Effective is the Protection?" (1991) 24 Ind. L. Rev. 1587

Zoe A. Bullen, "Oklahoma's Recreational Land Use Statute" (1984) 19 Tulsa L.J. 731

Michael S. Buskus "Tort Liability and Recreational Use of Land (1979) 28 Buff. L. Rev. 767

Jim Butler, " Outdoor Sports and Torts: An Analysis of Utah's Recreational Use Act" (1988) 47 Utah L. Rev. 47

Paul F. Clark, "Into the Wild: A Review of the Recreational Use Statute", (1998) N.Y. St. B.J. 22

Stuart J. Ford, "Wisconsin's Recreational Use Statute: Towards Sharpening the Picture at the Edges" (1991) Wis. L. Rev. 491

Harold W. Hannah, "Uncertainty About the Premises Liability of Illinois Farmers" (1996) 21 S. Ill. U. L.J. 61

Kathryn D. Horning, "The End of Innocence: The Effect of California's Recreational Use Statute on Children at Play" (1995) 32 San Diego L. Rev. 857

Donald P. Judges, "Of Rocks and Hard Places: The Value of Risk Choice" (1993) Emory L.J. 1

Jeffrey C. Kestenband, "*Conway* v. *Town of Wilton*: Statutory Construction, Stare Decisis, and Public Policy in Connecticut's Recreational Use Statute" (1998) 30 Conn. L. Rev. 1091

William C. Knowles, "Landowners' Liability Toward Recreational Users: A Critical Comment" (1982) 18 Idaho L. Rev. 59

Dean P. Laing, "Wisconsin's Recreational Use Statute: A Critical Analysis" (1983) 66 Marq. L. Rev. 312

Jan Lewis, " Recreational Use Statutes: Ambiguous Laws Yield Conflicting Results (1991) Trial 68

The Minnesota Recreational Use Statute: A Preliminary Analysis" (1977) 3 Wm. Mitchell L. Rev. 117

John G. Pike and S. Charles Neill, "Hunting Liability in Kansas: Premises Liability and the Kansas Recreational Use Statute" (1999) 38 Washburn L.J. 831

Sandra Renwand, "Beyond Commonwealth v. Auresto: Which Property is Protected by the Recreation Use of Land and Water Act" (1987) 49 U. Pitt. L. Rev. 261

Glen Rothstein, " Recreational Use Statutes and Private Landowner Liability: A Critical Examination of *Ornelas* v. *Randolph*" (1994), 15 Whittier L. Rev. 1123

Michael G. Sem, "Szarzynski v. YMCA, Camp Minikani: Protecting Nonprofit Organizations from Liability Under the Recreational Use Statute" 1995 Wis. L. Rev. 1209

George R. Thompson & Michael H. Dettmer, "Trespassing on the Recreational User Statute" (1982) Mich. B.J. 726

George R. Thompson, "Revisiting the Recreational User Act" (1988) Mich. B.J. 348

Christine C. Weiner, " Should Landowners Have Tort Immunity from Recreational Users?" (1988) 16 W. St. U. L. Rev. 201

Robert A. Williams, "Tough Choices Regarding Municipal Liability: The Application of the Idaho Recreational Use Statute to Public Lands – *Ambrose* v. *Buhl Joint School District no. 412*, (1996) 33 Idaho L. Rev. 185